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Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 908.

RICHARD P. BARDEN et al.,
Plaintiffs in Error.

vs.

NORTHERN PACIFIC R. R. CO.,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of Montana.

Brief for Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1892.

RICHARD P. BARDEN, WILLIAM MUTH, JAMES R. BOYCE and ADA F. BOYCE,
Plaintiffs in Error,
vs.
NORTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.
} No. 908.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action was brought by the defendant in error to recover possession of certain mining lots, numbered 68, 72, 73, 74 and 75, situated within the south half of the northwest quarter and the north half of the southwest quarter of

section 27, township 10 north, range 4 west of the principal meridian of Montana. The defendant in error claims title to the lands under the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the northern route," and the acts and joint resolutions supplemental thereto and amendatory thereof. By this act there was granted to the railroad company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office. * * * * * *Provided further*, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural

lands, in odd numbered sections, nearest to the line of said road may be selected as above provided. *And provided further*, that the word 'mineral' when it occurs in this act, shall not be held to include iron or coal."

The company duly accepted the provisions of this act December 29, 1864. February 21, 1872, it duly fixed that portion of the line of general route of its road extending through Montana. July 6, 1882, it definitely fixed the line of its railroad extending opposite to and past the land in controversy, and filed a plat thereof in the office of the commissioner of the general land office. Thereafter it duly constructed and completed that portion of its railroad and telegraph line extending on, over, and along the line of definite location, so fixed; and thereupon the president of the United States appointed three commissioners to examine the same, and the commissioners finding that said lines had been completed in all respects as required by the granting act, so reported to the president, who duly accepted the same. The south half of the northwest quarter and the north half of the southwest quarter of section 27 are on and within forty miles of the lines of general route and definite location as fixed, and of the railroad as constructed; and were, at the various dates, of the grant and of fixing the general and definite

routes, public unreserved lands, free from all adverse claims.

All of the lands in township 10 north, of range 4 west, P. M., were surveyed and the survey reported in 1868; and September 9th of that year the township plat was filed in the United States district land office. The land in controversy was returned by the surveyor as agricultural in character.

November 6, 1886, after the completion of its railroad, the company duly listed the south half of the northwest quarter and the north half of the southwest quarter of section 27, township 10 north, of range 4 west, P. M., Montana, with other lands, as a portion of its grant, in the United States district land office, and paid the legal fees for filing such list. The register and receiver duly accepted, allowed and approved the list, and certified the same to the commissioner of the general land office for patent, where it has since remained of record. No part of the fees paid to the district land officers has been returned or tendered to the company.

At the dates of the grant, survey, filing maps of general route and definite location, of the completion and acceptance of the road, and of the listing of the lands, the south half of the northwest quarter and the north half of the southwest quarter of said section 27, including

the land in controversy, had no value for mining purposes whatsoever, was not known mineral land, and was more valuable for grazing and agricultural or townsite purposes, than for mining.

However, during the year 1888 veins or lodes of rock in place, bearing gold, silver, and other precious metals, were discovered on the land, and certain parties, citizens of the United States, entered upon the land against the will of the railroad company and located mining claims on the lots sued for. The defendants below, plaintiffs in error here, entered upon such land claiming the right so to do under said locators, and have since remained in possession, mining and extracting ore therefrom. The land is now conceded to be mineral land.

The land has not been patented to the railroad company; the company claiming that it is vested with the legal title thereto by virtue of the facts stated, brought this action to recover possession of the land, and for damages for the ore mined. To its complaint, setting out the facts as here stated, the defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled in accordance with the opinion of Circuit Judge Sawyer (Judge Knowles dissenting), and June 29, 1891,

judgment was entered in favor of plaintiff for the recovery of the possession of the land and the sum of $1.00, as the value of the ore extracted therefrom, and costs. To correct said judgment this writ of error was sued out.

ARGUMENT.

THE QUESTION.

The sole question presented by the record is: Is the discovery of metal in quantities sufficient to render the land valuable for mining purposes, making it mineral land, before issuance of patent, but after the grant, survey, filing maps of general route and definite location, completion and acceptance of the road, filing of selection lists, payment and acceptance of the listing fees, and the acceptance, allowance and approval of such list by the register and receiver, during all of which times the existence of the metal was unknown, sufficient to bring such land within the meaning of the proviso excluding "mineral lands" from the grant made by the act of congress approved July 2, 1864; such land being otherwise within the terms of the grant?

The answer to the foregoing question must be found in the meaning of the phrase "mineral

lands" as used in the act. Three definitions of this term have been advanced.

FIRST.—That "mineral lands," as the term is used in this and similar legislation, are lands more valuable for mining than for agricultural uses, such value to be determined in view of the known, or reasonably apparent, condition of the land. This is the definition contended for by the defendant in error in this case. And, as a corollary thereto, it is insisted that if the known or reasonably apparent condition of land was not such as to give it a greater market value for mining than for agricultural pursuits at the time the title passed to the specific tract from the United States (the date of filing the map of definite location in the office of the commissioner of the general land office, under the act of July 2, 1864), an indefeasable title to the land would vest in the grantee, regardless of subsequent developments, increasing its mineral value.

SECOND.—That lands that have a market value for the minerals therein, without any reference to any other character or quality connected therewith, are "mineral lands;" and any lands acquiring such market value prior to patent are excluded from these grants. This definition is given by Judge Knowles, in his dissenting opin-

ion in this case, as the correct exposition of the law.

THIRD.—That all lands which in fact contain metals in quantities sufficient to pay for their exploitation are "mineral lands," and as such are excluded from these grants, though there be nothing to indicate the presence of the metals in such or in any quantities; and though its existence could not, and cannot, be ascertained with reasonable diligence. Under this definition, it is logically insisted that a discovery of mineral in paying quantities in the land at any time, it may be one thousand years hence, establishes that such land was never a part of the grant.

It will be noted that the principal difference between the first and second definitions is as to the time when the mineral value of the land is a material factor in determining if lands fall within the proviso. We will hereafter show that this difference as to time is based on a difference as to when the title vests in the grantee rather than on any difference as to what is "mineral land."

WHAT ARE THE MINERAL LANDS?

In answering this question, we shall examine first, the decisions of the courts construing this and analogous terms as they are used in the various acts of congress, and particularly those

decisions construing such terms when used for the purpose of excluding lands from grants; second, the similar decisions and rulings and instructions by the officers of the department having charge of the public lands; third, the legislation of congress upon this subject. We shall then examine the act of congress approved July 2, 1864, to see if it requires a different construction to be placed upon the terms as used therein from what they have received in other legislation; such examination to include an investigation of the effect of placing upon the term the various constructions contended for.

THE DECISIONS OF THE COURTS.

Ah Yew v. Choate, decided by the supreme court of California in April, 1864, construes the term "mineral lands," as used in an act excluding "mineral, swamp or overflowed lands," from location or purchase as school lands. The court says:

"All lands containing gold are not necessarily mineral lands within the meaning of the section under consideration. There is probably very little land within the basin formed by the Sierra Nevada and Contra Costa ranges of mountains that does not contain more or less of the precious metals. It may turn out that much of the land now regarded as suitable only for pasturage and agricultural purposes contains sufficient quanti-

ties of gold to justify the expense of extracting it by mining; yet, in the present state of our knowledge upon the subject, it could not be called mineral land. It is not easy in all cases to determine whether any given piece of land should be classed as mineral lands or otherwise. The question may depend upon many circumstances: such as whether it is located in those regions generally recognized as mineral lands, or in a locality ordinarily regarded as agricultural in its character. Lands may contain the precious metals, but not in sufficient quantities to justify working them as mines, or make the locality generally valuable for mining purposes, while they are well adapted to agricultural or grazing pursuits; or they may be but poorly adapted to agricultural purposes, but rich in minerals; and there may be every gradation between the two extremes. There is, however, no certain, well-defined, obvious boundary between the mineral lands and those that cannot be classed in that category. Perhaps the true criterion would be to consider whether upon the whole the lands appear to be better adapted to mining or other purposes."

24 Cal., 567.

In this, the first reported decision wherein a court has suggested a test by which to determine if lands be mineral or agricultural, the difficulties in the way of determining whether a given tract belongs to one class or the other is fairly stated; and the criterion suggested as the only practicable one, has since received the approval of every court called upon to pass upon the question. From the very nature of the case, exact

knowledge as to the mineral deposits in any given tract of land is an impossibility. The forum called upon to decide the question, whether the land department or a court, must necessarily base its decision upon the *apparent* quality of the soil at the date of the decision, if not at an earlier date; and land must be classed as mineral or non-mineral at any given time upon its quality as known or reasonably apparent at that time.

Gold Hill Quartz Min. Co. v. Ish, 5 Or., 104, decided in 1873, was an action brought to quiet title. Plaintiff was a mining corporation and claimed under certain mining locations made in 1865, under the state laws, and the rules and customs of miners. Defendant claimed under a patent issued pursuant to a cash purchase made of the United States in 1870. The purchase was made under the provisions of section 7 of the act approved February 14, 1853, (10 Stat., 158). "Mineral lands" were in terms excepted from the provisions of this act. The court says:

"The application to purchase was made subsequent to the act of 1866, and at a time when the possession of the appellant was open and notorious. * * * * Ish obtained no interest in the mining claims on the lode by the patent. True, by the patent he obtained a given quantity of agricultural lands, and the lode is situate upon said lands, but the *known* deposits

of precious metals did not pass by the patent, for they were expressly reserved from sale under the preemption *and other land acts.* * * * * The open and notorious possession of the appellant was sufficient to charge the respondent with notice of the character of the lode, and also to bring the lode within the description of 'known mineral deposits.'"

In view of the fact that the mineral lands in Oregon excluded from the preemption and other land acts are described in terms as "mineral lands," and not as lands containing "known mines" or "known mineral deposits" (Act of Sept. 27, 1850, 9 Stat., 496, sec. 5 and 14; Act of Feb. 14, 1853, 10 Stat., 158, sec. 7; Act of July 17, 1854, 10 Stat., 305, sec. 3), this language by the court is very significant of its understanding that "mineral lands," as used in these acts, means "lands known to contain metals;" that it is synonymous with the term used in the tenth section of the preemption act of September 4, 1841 (5 Stat., 456), "lands on which are situated any known mines." We shall hereafter show that congress has often used these terms as synonymous.

Alford v. Barnum, 45 Cal., 482, decided in January, 1873, presented the question as to what constituted "mineral lands," as the term is used in the acts of congress approved July 1, 1862, and July 2, 1864, granting lands to aid in

the construction of the Central Pacific Railroad. The court held that "the mere fact that portions of the land contained particles of gold or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land within the meaning of the acts referred to. It must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes. Any narrower construction would operate to reserve from the uses of agricultur elarge tracts of land which are practically useless for any other purpose, and we cannot think this was the intention of congress."

In *Merrill v. Dixon*, 15 Nev., 401, decided at the October term, 1880, the supreme court of Nevada held that in excluding mineral lands from the grant to the Central Pacific Railroad Company, "congress only intended to reserve lands valuable for mining purposes," citing *Alford v. Barnum, supra*.

Ivanhoe Mining Co. v. Keystone Consolidated M. Co., 102 U. S., 167, decided November 22, 1880, was an action to recover possession of land. The plaintiff asserted title under a patent from the state of California. The title of California rested upon the grant of sections 16 and 36 for school purposes. The defendant asserted title under an United States patent for mineral

lands. The court held that mineral lands were excluded from the operation of the school grant, and, in conclusion, held "that the land in controversy being mineral land, *and well known to be so when the surveys of it were made*, did not pass to the state under the school section grant." Here, as in *Gold Hill Quartz Mining Co. v. Ish*, 5 Or. 104, the use of the words "well known to be so," where the exception was of "mineral lands," is significant of the court's interpretation of the latter term.

Pacific Coast M. & M. Co. v. Spargo et al., 16 Fed. Rep., 348, decided April 16, 1883, was an action brought to recover possession of land in California. Plaintiff claimed by virtue of a patent issued September 6, 1876, under cash entry made December 19, 1874; the defendants under a gold-bearing quartz lode location made in March, 1880, which lode extended under the land. In California, it is to be remembered, the lands excluded from disposition under the agricultural land laws were not in terms "lands on which are situated any known salines or mines." The term of exclusion employed in the various statutes extending the land laws over that state is "mineral lands." As in the railroad grant, the restricting term, "known," is omitted. Nevertheless, the court held that plaintiff acquired by his agricultural land patent the title to the mine,

its existence being unknown at the date of entry and patent.

Pacific Coast M. & M. Co. v. Frick et al., decided with the *Spargo* case, *supra*, differed from that case in that the mineral location was made before issuance of the agricultural patent, though after entry and payment for the land. The court held, however, that this could make no difference in the rights of the parties. That upon the payment of the purchase price the entryman became the equitable owner of the land, and that the patent related back to the date of the entry; and as the agricultural entry preceded the mineral location, the entryman on obtaining his patent acquired the legal title to the mine as well as to the land. This notwithstanding the exception.

McLaughlin v. United States, 107 U. S., 526, was an action brought by the United States to cancel a patent issued to the Western Pacific Railroad Company under the grant made by the act of July 1, 1862, as amended July 2, 1864, for the reason that the land was mineral land. The court found that the land was known to be mineral in 1863 and therefore affirmed the decree of the circuit court cancelling the patent. The case is of interest as containing a strong implication by the court that the mere existence of metal, unknown to the world, is not sufficient

to make it mineral land, so as to exclude it from the railroad grant. They say:

"This being the first case of the kind in this court, a class of cases which may possibly be indefinitely multiplied, it is to be regretted that it was not more fully presented in the circuit court. Many interesting questions might arise in this class of cases not proper to be considered in this case. For instance, the nature and extent of mineral found in the land granted or patented which will bring it within the designation of *mineral land* in the various acts of congress, in which it is excepted out of grants to railroad companies and forbidden to be sold or pre-empted as ordinary or agricultural lands are.

"Suppose that when such land has been conveyed by the government it is afterwards discovered that it contains valuable deposits of the precious metals, unknown to the patentee or to the officers of the government at the time of the conveyance, will such subsequent discovery enable the government to sustain a suit to set aside the patent or the grant? If so, what are the rights of innocent purchasers from the grantee, and what limitations exist upon the exercise of the government's right? We can answer none of these questions here, and can only order that the decree below be affirmed."

Cowell v. Lammers, 21 Fed. Rep., 200, decided August 11, 1884, was an action in equity to enjoin trespass in the nature of waste in working a gold mine on an odd numbered section within the Central Pacific grant. The plaintiff claimed through a patent issued to the railroad company under the granting act, June 27, 1867. In this

patent was inserted the following: "Excluding and excepting from the transfer, by these presents, 'all mineral lands,' should any such be found to exist in the tracts described." In 1881 the defendant entered upon the land, assuming it to be public mineral land, prospected it, and located a mining claim thereon, insisting that he had discovered a valuable gold mine at the place of location, that the land as "mineral land" was excluded from the railroad grant, and was within the terms of exception in the patent. The court held that "there is no express authority in the statute to issue a patent covering known mineral lands at all, and no more authority to insert a clause in a patent issued, excepting and excluding therefrom, generally and indefinitely, without describing them so as to identify the exceptions made by the patent, 'mineral lands,' should any be found to exist in the tracts described." Having held that the department could not by the insertion of such exclusion clause in the patent, shirk the duty of determining if the lands be mineral, and that consequently the patent must be regarded as a determination that the lands were not mineral, he adds:

"The land department in this very case, as in ceses of patents to pre-emptioners, homestead claimants, and other purchasers of the public lands, have acted, and I think correctly, upon

the idea that patents to lands not known to be mineral lands at the time the patent issued, carry the title to all mines subsequently discovered in the lands, notwithstanding the reservation from sale of mineral lands in the acts of congress. By the words 'mineral lands' must be understood lands known to be such, or which there is satisfactory reason to believe are such at the time of the grant or patent. And the United States courts which have had occasion to act upon this subject, so far as I am aware, have adopted that idea. *P.C., M. & M. Co. v. Spargo*, 8 Sawy., 645; S. C. 16 Fed. Rep. 348. There must be some point of time when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent. The supreme court has not yet had occasion to decide the point as to the effect on a patent of a discovery of a valuable mine in land subsequent to the issue of a patent. Any other construction would be disastrous in the extreme to the holders of lands in California under United States patents. If land which a party has actually occupied, possessed and peaceably enjoyed for a long series of years, claiming title under a patent of the United States 15 years old, can be entered upon and prospected for a mine by any trespasser who chooses to do so, and, a mine being found, the mine can be located, and taken out of the patent on the vague and uncertain exception in the patent in question, it can be done fifty or a hundred years hence, and the patent, instead of being a muniment of title upon which the patentee or his grantees can rest in security, would be but a delusion and a snare. Congress could never have contemplated such a construction and execution of the acts in question" (p. 205).

In this case it was not necessary to determine what would be the effect of a discovery of mineral after location and construction of the road, but before patent.

In *Ferry v. Street*, 7 Pac. Rep., 712, decided August 4, 1885, the supreme court of Utah determined the effect of the discovery of mines upon land after a patent had been issued therefor, by virtue of an entry of the same with Valentine scrip. The law providing for the issue of this scrip (17 Stat., 649) restricts its location to lands "not mineral." The court says:

> "It would be a strange doctrine, if, after the United States government has patented lands away, and minerals should be discovered in the land, within his patent or deed, that some outside discoverer should say that patent was void. Such was not the intention of the law."

Deffeback v. Hawke, 115 U. S., 392, decided November 16, 1885, presented the question whether, upon the public domain, title to mineral land can be acquired under the laws of congress relating to townsites. The townsite law provides in terms that "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof" (Sec. 2386 R. S.). Again, that "no title shall be ac-

quired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws." The court, after briefly stating the legislation relating to mineral lands, says:

"It is plain, from this brief statement of the legislation of congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the townsite laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the efforts to extract them. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is '*valuable* mineral deposits' which are declared to be free and open to exploration and purchase. The same term is carried into the revised statutes. It is there enacted that 'lands *valuable* for minerals' shall be reserved from sale, except as otherwise expressly directed, and that '*valuable* mineral deposits' in lands belonging to the United States shall be free and open to exploration and purchase. We also say lands *known* at

the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the preemption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued" (p. 404).

United States v. Reed, 28 Fed. Rep., 482, decided September 3, 1886, was an action in equity to set aside a homestead patent issued under an entry made September 2, 1880, on the ground that the land was mineral and not agricultural, and was, at the date of entry, more valuable for mining than agricultural purposes, and so known to the patentee. The court, in disposing of the question, said:

"The nature and extent of the deposit of precious metals which will make a tract of land 'mineral' or constitute a 'mine' thereon, within the meaning of the statute, has not been judicially determined. Attention is called to the question in *McLaughlin v. U. S., supra*, 528, but no opinion is expressed. The land department appears to have adopted a rule that if the land is worth more for agriculture than mining, it

is not mineral land, although it may contain some measure of gold or silver; and the bill in this case is drawn on that theory of the law. In my judgment this is the only practicable rule of decision that can be applied to the subject. Nor can account be taken, in the application of this rule, of profits that would or might result from mining under other and more favorable conditions and circumstances than those which actually exist, or may be produced or expected in the ordinary course of such a pursuit or adventure on the land in question" (p. 486).

In *The Tombstone Townsite Cases*, 15 Pac. Rep. 26, decided September 1, 1887, the supreme court of Arizona held that a townsite entry upon land not known to be mineral land at the time of entry was prior to any after-acquired mining claim. They say:

"To hold that every purchaser of a lot under a townsite patent, who erects valuable improvements thereon, ever after rests upon the precarious chance of having his title and possession defeated by the discovery of minerals sufficient in amount to sustain a mining claim, is further than we can go."

In *Colorado Coal and Iron Co. v. U. S.*, 123 U. S., 307, decided November 21, 1887, a bill was filed to set aside patents issued under the preemption law, on the ground that it was known at the time of their issue that the lands contained mines of coal. But the court said:

"To constitute the exemption contemplated

by the preemption act under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there was not actual 'known mines' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the preemption act cannot be successfully assailed" (p. 328).

In *Blackmore v. Reilly*, 17 Pac. Rep., 72, decided March 16, 1888, the supreme court of Arizona followed its decision in *The Tombstone Townsite Cases, supra.*

Hunt v. Steese (Cal.), 17 Pac. Rep., 920, decided April 26, 1888, arose on appeal from an order of the court dissolving a temporary restraining order, and refusing to enjoin waste by the defendants, committed in the course of mining. The plaintiff deraigned title through a

patent issued to the Central Pacific under the grant to that company by the act of congress approved July 1, 1862, and the amendment thereto approved July 2, 1864. The patent was dated February , 1875, and contained the following clause: "Yet excluding and excepting from the transfer by these presents all mineral lands, should any be found to exist in the tracts described in the foregoing." The defendant claimed that the land fell within this clause and the exception from the grant, excluding mineral land. The court below found as a fact "that at the time the patent of the United States issued the plaintiff's grantor the land in controversy was known, and had been for several years prior thereto, to be valuable for minerals;" and held that, consequently, no title passed to the railroad company. The supreme court reversed the order appealed from, saying:

"It is not sufficient to show that the land had been profitably worked for gold prior to the issuance of the patent. It should clearly appear that the lands were at the date of the grant more valuable for mining than for agriculture, and were known to be such; that they were more valuable under the conditions existing at the time of the sale for mining than for agricultural purposes" (p. 922).

This court, December 17th, 1888, in United States *v.* Mining Co., 128 U. S., 683, said:

"It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account and justify their exploitation."

In *Amador Medean M. Co. v. South Spring Hill M. Co.*, 36 Fed. Rep., 668, decided November 5, 1888, the United States circuit court for California construed the exception excluding "mineral lands" in California from entry under a bounty land warrant issued to the soldiers of 1812. The court says:

"By the entry and payment * * * there being no known mine on the land, the entire interest to the centre of the earth vested in him, and there was nothing left in the United States for a subsequent grant to the parties to operate upon."

In *Richards v. Dower* (Cal.), 22 Pac. Rep., 304, decided October 1, 1889, the question presented was whether or not the premises in controversy were reserved out of the townsite patent issued for the townsite of Nevada, July 1, 1869, as falling within the terms of the proviso

to the act of March 2, 1867 (14 Stat., 541), or the act of June 8, 1868 (15 Stat., 67). The first proviso referred to is, "That no title shall be acquired under the provisions of this act to any mine of gold, silver, cinnabar, or copper." The second: "That no title under said act of March 2, 1867, shall be acquired to any valid mining claim or possession held under the existing laws of congress." It was conceded that both provisos were in force. The existence of the lode was known years before the townsite entry; it had been mined, and at the date of the townsite entry was considered as a worked-out and valueless lode. After the patent the lode was re-located and mining work commenced thereon by the defendants, who claimed it was excluded from the patent as within one of the above provisos. The supreme court of California, in disposing of the case, says:

"What was a mine of gold within the meaning of the act of 1867? Without the aid of any judicial or legislative construction, we should say without hesitation that one essential requisite of a gold mine would be a natural deposit of rock or earth containing a sufficient quantity of gold to admit of profitable working. If lands are known to contain precious metals, but in quantities so small as not to justify the attempt to extract them, they are not properly called 'mineral lands'; and even if they might be mined at a very small profit, but are clearly of more value for agriculture than for mining, they are

agricultural, rather than mineral lands. There is abundance of authority for this view. We know of nothing in the statutes of the United States as they existed in July, 1869, which indicates a more jealous policy with respect to mineral lands than is manifested by the following provision of the revised statutes: 'In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.' Section 2318. This is a clear declaration that the present policy of the government is to reserve only such mineral lands as are valuable as such; and there is no reason to suppose that it ever had a different policy."

Francoeur v. Newhouse, 40 Fed. Rep., 618, decided December 9, 1889, was an action to recover possession of land. The facts as averred in the complaint were substantially the same as presented here. The plaintiff deraigned title through the grant made by act of congress approved July 1, 1862, to aid in the construction of the Central Pacific railroad. The defendant claimed title under a patent from the United States issued May 5, 1885, for the land as mineral land upon an application made in 1885. The discovery was alleged to have been made in 1883, long after the location and completion of the road. No patent had been issued to the railroad company. Judge Sawyer (Judge Sabin concurring), says:

"The next question is, did the land in question pass by the grant of 1862, perfected in

1866-67 in which a gold mine was discovered in 1883, 21 years after the grant attached by the filing of a plat of the general route of the railroad, and the withdrawal of the lands in pursuance of the statute, by the secretary of the interior, and more than 17 years after the completion of the road, and its acceptance by the president, and more than 16 years after the final survey, and report of the lands, as agricultural, and not mineral? The parties to this grant, both the United States and the grantee, must be presumed to have contemplated a grant in view of the condition of the lands as they were known, or appeared to be, at the time the grant took effect. In the exception of 'mineral lands' from the grant, congress must have meant not only lands mineral, in fact, but lands known to be mineral, or, at most, such as were apparently mineral, and generally recognized as such. Congress could not have contemplated that the discovery of a paying mine, 15 or 20 years after the making of the grant, and the performance of all the conditions by the grantee, required to perfect the title and render it irrevocable, should vitiate the grant. If so, then such a discovery 50 or 100 years after, would effect the same result. In granting the public lands, congress must be presumed to deal with them in view of the conditions as they are known, or supposed to be, at the time. Exceptions must be presumed to refer to matters that are readily apparent upon inspection. Any others would be altogether too indefinite to be valid. The conditions constituting the exception ought, certainly, to be ascertainable at the time the grant takes effect, or they ought not to be operative; otherwise the greatest confusion and inconvenience, public and private, must necessarily result. The grant should point out what is granted in such terms that the grantee may be

able to ascertain by inspection and know at the time the location is definitely fixed, and it becomes operative, what specific tracts of land are granted, and what are excepted from the grant. These lands, soon after the grant, were conveyed in trust, under authority of the law, as security for the bonds issued. out of the proceeds of which the road was constructed; and the proceeds of these sales are devoted by the trustees to the redemption of the bonds. Is this security to be impaired, or destroyed, by taking from the operation of the grant all lands in which at any future time gold or other valuable metals may be discovered? If so, all of the lands may sooner or later revert to the United States, and these bondholders, and those who, in good faith, have purchased the lands of the company, without being aware of the mines secluded in their lower depths, will be largely injured.

These words "mineral lands" used in the act must be construed in a practical sense — as practical men would use them in contracting about them—must be construed with reference to their present known. or, at least, obviously apparent condition" (p. 620).

In his charge to the jury in this same case Judge Sawyer reiterated these views. *Francoeur v. Newhouse*, 43 Fed. Rep., 236.

In *Davis v. Wiebbold*, 139 U. S., 507, decided April 6, 1891, the question as to the effect of the discovery of a mine within the limits of a town-site theretofore patented, was squarely presented to this court. In determining the question the court says:

"The exceptions of mineral lands from preemption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant. There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term mineral in the sense of this statute is applicable" (p. 519.)

After reviewing a number of decisions by the courts and interior department upon this subject the court continues:

"It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction."

In *Smith v. Hill*, 26 Pac. Rep., 644, decided May 18, 1891, the supreme court of California passed upon the question presented by the min-

eral exception in the townsite act, as applied to a case where the land had been mined long prior to the townsite entry, but at the time of the entry the mine had been abandoned and appeared to have been worked out. The court held that as the mine appeared to have been worked out, the land was not known to be mineral land at the date of the patent, that the title passed thereby, and a subsequent discovery of a valuable mine on the lands was immaterial; that the exception in the act means "a paying mine known to exist at the time of the grant to the county judge, or one which there was good reason to believe then existed."

This mineral question came next before the courts in this case, decided June 12, 1891. The carefully reasoned-out opinion of the circuit judge follows and sustains the doctrines announced in the long line of authorities we have referred to. The opinion of the district judge, dissenting therefrom, is the only opinion that has been handed down by any court, where these doctrines have been questioned; and, as we shall hereafter show the court, that learned judge has since receded from positions which were the logical and necessary result of the views here announced by him, and, we think, must be considered as having abandoned those views.

Northern Pacific Railroad Company v. Walker et al., 47 Fed. Rep., 681, decided in September, 1891, is an action brought to enjoin the sale for taxes of certain lands which, if non-mineral, are a portion of the grant made by the act of July 2, 1864, to aid in the construction of the Northern Pacific Railroad. Assuming the position on this mineral question taken by Judge Knowles in his opinion in this case, and here urged by plaintiff in error, to be the law; and that the discovery of metal at any time prior to the issuance of patent is sufficient to bring the land within the exception; that it was, consequently, the known mineral condition of the land at the date of patent which determined whether it passed by the grant, the railroad company urged that the unpatented lands were not identified as a portion of the grant and were not fully segregated from the public lands, since it is impossible to say now what their known mineral condition will be at the date of patent. That as the government is the owner of whatever lands may become known to be mineral prior to an indefinite future time, and it is impossible to say, prior to that time, which lands will become so known, the government has a potential interest in every piece until the lands are patented, and therefore that they are not taxable. Also, that, since mineral explorations are confined by law

to the public lands, these unpatented lands, if subject to such exploration and entry upon the discovery of mineral, could not be held taxable as the private property of the railroad company. The court, the circuit and district judges concurring, sustained a demurrer to the bill, saying, as to these propositions:

"Mineral lands are undoubtedly excluded from the grant; but there must be a time and mode for determining, once for all, what lands are mineral. The determination of this question cannot be left to the accident of future ages. The mineral lands excluded from the operation of the act are the lands known to be such at the time the company acquired its title."

This cause has been set for hearing on January 8, 1893, by this court upon this and other questions, arising on the record, certified here by the circuit court of appeals.

Summary of Court Construction.

It appears from this review of the various decisions heretofore rendered by the courts in the mining states, federal and state, whose attention has been called to the subject, that those courts have uniformly held the term "mineral lands" as the same is used in the various acts of congress providing for the disposition of the public domain, excluding such lands from such disposition, to mean the same thing, to-wit: lands more

valuable for mining than for agricultural or other purposes, that value to be determined in view of the known, or reasonably apparent, condition of the land at the time the title to it passes from the government to the grantee. No distinction has been made, whether the law from whose operation the "mineral lands" were excluded is the pre-emption, homestead or townsite act, or the school land or railroad or other internal improvement grants.

The proviso in the townsite act, that "no title shall be acquired" under its provisions, "to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws," is conclusively determined by this court to have the same meaning as the term "mines" in the clause in the preemption act of 1841, excluding from disposition under that act "known salines or mines." The lower courts, both federal and state, have, without an exception, construed both terms as synonymous with the term "mineral lands" as used in the preemption and homestead acts as extended over California, Nevada and Oregon; and in section 2318 R. S. and in the railroad grants. This court has repeatedly treated these terms as synonymous and has cited with approval the decisions of the lower courts so construing them. Congress has also, as we shall hereafter show, so considered and used the terms.

The decisions further settle that the quality of any specific tract, as mineral or agricultural, is subject to change. Mineral lands may, by being worked out, become agricultural; agricultural lands, by new discoveries of mineral, by change in the existing conditions, by the invention of improved methods of mining, become more valuable for mining than for other purposes, and hence mineral. This is the necessary result of the uniform definition given the term "mineral land."

EXECUTIVE AND OTHER CONSTRUCTION.

January 20, 1790, the House of Representatives called upon Alexander Hamilton for the form of a plan of disposition of the public lands of the United States. This form, reported by Mr. Hamilton July 20, 1790, has been the stem upon which nearly all subsequent agricultural land laws have been grafted. In this plan all lands were considered as available for agricultural purposes, and no reference is made to mineral lands.

The Public Domain, 1884, p. 198.
Report of the Public Lands Commission, p. xix.
1 Am. State Papers, 4, 5.

Later it was discovered that great and special values existed in lands bearing certain minerals,

as coal, lead, iron and copper, etc.; and these lands containing these metalliferous deposits in quantities sufficient to add to their richness and justify the expense of their exploitation, were early placed in a class by themselves as "mineral lands," and reserved by law and executive orders from disposition as agricultural lands. Says Mr. Harris:

"From the year 1795 the U. S. Congress has "adopted the policy of reserving from sale the "public mineral lands, under the idea that their "great value might some day or other be util- "ized for the benefit of the nation at large. " * * * For this reason, among others, the "lead mines were, for a period from 1807 to "1846, reserved from sale, and so have been all "mineral lands from the pre-emption acts from "1830 to 1841, and from the acts granting "lands to railways, and from all grants of lands "to states for school or other purposes. That "this was the intention and policy of the govern- "ment is shown by a joint resolution passed in "January, 1865, whereby congress resolved "that all mineral lands were expressly reserved "from any grants made by them in the previous "session to states or corporations, or for other "purposes."

Harris' Mining Law of the United States, p. 9.

Copp's U. S. Mineral Lands, Preface, III.

Report of the Public Lands Commission, XIX.

In 1814, Albert Gallatin, described the settled procedure for the disposition of the public lands. Among other things, he says:

"The following tracts are excepted from the "sales, viz.: * * 3, all salt springs and lead "mines are also reserved, but may be leased by "the president of the United States. * *

"All the other public lands, not thus excepted, "are, after the rightful private claims have been "ascertained and confirmed, offered for sale at "public sale in quarter sections of 160 acres "each. * * The lands not purchased at pub- "lic sale may, at any time after, be purchased "in quarter sections at private sale."

The Public Domain, 1884, p. 204.

In his annual report for 1837, the secretary of war asks congress to authorize the disposition of land containing lead mines; "and also of all ore banks and lands containing mineral of any description whatsoever, under the control of the war department."

4 Congressional Globe, 2d Sess., 25th Congress, Appendix, p. 6.

February 6, 1839, the House of Representatives adopted a resolution requesting the president to prepare and present to the next congress a plan for the sale of the public mineral lands.

5 Congressional Globe, 3d Sess., 25th Congress, p. 165.

In his annual report for 1842, the secretary of war classifies "mineral lands" by themselves and speaks of them as having been reserved.

Congressional Globe, 3d Sess., 27th Congress, Appendix, p. 34.

And in his report for 1843, he says:

"Some legislation is undoubtedly necessary, to "prevent the numerous frauds attempted to be "perpetrated, in appropriating to individual use, "at ordinary prices, lands known to abound with "rich mineral." * * *

"Measures were taken early in the present "season to secure the rich mineral region south "of Lake Superior from falling into the hands "of intruders, who might endeavor, ultimately, "to wrest from the government those valuable "lands, which, in addition to lead, are found to "abound in copper ore of a superior quality."

13 Congressional Globe, 1st Sess., 28 Congress, 12.

In U. S. *v.* Gear, 3 How, 120, decided at the December term, 1884, this court held that the acts of congress had shown a uniform policy excluding the mineral lands from disposition under the agricultural land laws.

In the annual report for 1844, the secretary

of war recommends "the removal of all special restriction from the sale of 'mineral lands.'"

Congressional Globe, 2d sess., 28th Congress, Appendix 11.

In his message to congress in December, 1845, President Polk recommends that the existing system of controlling the "mineral lands" be changed.

Congressional Globe, 1st sess., 29th Cong., 10.

In his annual report for 1850 the secretary of the interior recommends that the "mineral lands" be divided into small tracts and sold in fee.

Congressional Globe, 2d sess., 31st Congress, Appendix, p. 7.

In his message to congress in December, 1851, President Fillmore classifies lands into agricultural and mineral.

Congressional Globe, 1st sess., 32d Congress, p. 4.

In a circular issued September 15, 1841, to the registers and receivers of the United States land offices, containing directions for procedure under the preemption act of September 4, 1841, the commissioner, in enumerating the description

of lands exempted from this act, included "all lands on which are situated any known salines or mines;" following the language of the statute.

By the act of March 3, 1853, (10 Stat. 244), it was provided (sec. 6), "that all the public lands in the state of California, whether surveyed or unsurveyed * * * * excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the preemption laws of fourth September, 1841, with all the exceptions, conditions and limitations therein, except as is herein otherwise provided."

In circular of instructions issued to the registers and receivers in California, October 12, 1853, construing this act, Commissioner Wilson defines the above exception of "mineral lands" as "lands on which are situated any known salines or mines."

1 Lester's Land Laws, p. 698.

This practical construction of the term has never been questioned; and "mineral lands," as the phrase is used in this act, has now been for nearly forty years uniformly construed by the department as exactly synonymous with the phrase "known mines" in the preemption act of September 4, 1841.

The secretary of the interior in his annual report for 1858, says: "When mineral lands have

been sold special provisions have been made for the disposal of them."

Congressional Globe, 2d Sess., 35th Congress, Appendix, p. 27.

February 6, 1856, Secretary McClelland, in a letter to Hon. Franklin Pierce, says, with reference to the mineral-land policy of the United States:

"Whenever a grant has been made of land, and any lead or copper mines were discovered in them, the latter passed to the grantee."

1 Lester's Land Laws, 645.

In his annual report for 1865, the commissioner of the general land office, says:

"The laws and theory are, that the mineral "lands are the property of the nation, and can- "not be sold or disposed of under existing legis- "lation" (p. 39).

When, by the act of July 26, 1866 (14 Stat., 251) the "mineral lands of the public domain, both surveyed and unsurveyed" were declared to be free and open to exploration and occupation, and provision was made for the entry and patenting of "a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar or copper," the question what are mineral lands became important, and the term early received departmental construction.

In circular of instructions issued under this act January 14, 1867, the commissioner says of section 11:

"In order to enable the department properly to give effect to this section of the law, you will cause your deputy surveyors to describe in their field notes of surveys, in addition to the data required to be noted in the printed Manual of Surveying Instructions, on pages 17 and 18, the agricultural lands, and represent the same on township plots of the designation of 'agricultural lands.'"

2 Lester's Land Laws, 317.
Copp's U. S. Mining Decisions, 245.

As the deputy surveyors must necessarily determine the character of the land under these instructions, either from knowledge of mines actually existing, or from the surface indications, this adoption of the surveyor's return as the test by which the secretary was to determine what lands were clearly agricultural, constituted a practical construction of the term "mineral lands" as including only lands known to be such or which there were satisfactory reasons to believe were such.

In circular of instructions issued January 24, 1867, ten days later, governing the selection of granted lands under the Pacific Railroads Acts approved July 1, 1862, and July 2, 1864, is contained the following direction:

"Iron and coal lands are subject to selection by the Pacific Railroads; but all other minerals are expressly excluded from the grant, and must necessarily be so from all selections you may certify to this office. When the verified lists are received at the general land office, prepared and certified as above required, such definitive action as the law requires will be here taken, with the view to vest the grantee with a complete title."

2 Lester's Land Laws, 364.

Accompanying this circular were forms of affidavit to be attached to the selecting list by the agent of the railroad company, and certificate to be signed by the local officers on approval of the list. From these forms we quote the following extracts:

"I ————, being duly sworn, depose and say that * * * * the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands."

"We hereby certify that we have carefully and critically examined the foregoing list of lands * * * * and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved * * * * that the same (lands) are not, nor is any part thereof, returned and denominated as mineral land or lands."

2 Lester's Land Laws, 364, 365.

These instructions and forms have been continued in use, substantially unchanged, until the

present time. They were prescribed as the directions governing the listing of lands by the Northern Pacific. Such an affidavit and such a certificate are attached to the list selecting the land here in controversy. These instructions and forms, practically adopting the surveyor's returns as the test by which to determine what lands are excluded from the grants as mineral, necessarily construe that term as it was construed in the circular of January 14, 1867, hereinbefore referred to.

In circular of instructions issued May 16, 1868, the commissioner says:

"It is not doubted that in every township there are tracts of land more valuable for farms and gardens than for mining purposes, and the object of the law is to segregate these from the mineral and dispose of them as agricultural * * * * Affidavits alleging particular lands to be more valuable as mineral than as arable, must apply to each of the smallest legal subdivisions. Of a quarter section, 120 acres may be mineral, and the remaining 40 arable, and the mineral character of the former is no reason why the latter should not be entered as agricultural. Nor is it sufficient that such affidavits are based upon opinion or belief. They must contain a statement of facts within the knowledge of deponents, derived from actual observation or examination, furnishing a strong presumption that the particular subdivision is mineral land, and more valuable as such than as agricultural. Mere speculation, based upon no positive knowledge, and disclosing no material

facts, will not be received, and claimants ought not to be put to the trouble and expense of meeting affidavits of this character. There should be the utmost good faith required from both sides. Lands more valuable for mineral than for other purposes are not to be taken under the pre-emption or homestead laws; nor, on the other hand, are parties to be intimidated from making settlements upon, and ultimately entering under these laws such lands as are most useful for agricultural purposes, simply because valuable mineral lands may lie in the immediate vicinity. Both classes of lands are to be disposed of under their appropriate laws, and neither interest is to be subordinated to the other, to the detriment of the public welfare.

* * * * * * * * * * *

"It matters not whether the precious metals are found in quartz ledges, or in placer or hydraulic mines, if the particular subdivisions of the public lands containing them are more valuable for mining than for agriculture, they cannot be entered under the pre-emption or homestead law. If placers once valuable have become exhausted, so as no longer to be valuable as mines, the land may then be entered as arable."

2 Lester's Land Laws, 321–2.
Copp's U. S. Mining Decisions, 250–1.

In his annual report for 1868, the Commissioner of the General Land Office sets forth the same doctrine. Quoting from instructions given surveyors-general, he says:

"Timber lands on rocky hills and mountains, not known to contain any of the aforesaid minerals, will be designated as 'agricultural,' and if the contrary, as 'mineral.'

"Although gulch and creek mines are not specially named in act of July 26, 1866, yet if the lands containing them are more valuable for mining than for agriculture, they will be reported as mineral.

"Placers once valuable, but which have become exhausted, so as no longer to be valuable as mines, will be returned as agricultural."

2 Lester's Land Laws, 334.

Again in the report for 1869, he says:

"The register and receiver of the proper district were instructed to the following effect: That as there are many tracts in what are called the mineral districts of no value for mining purposes, but well adapted to agriculture and horticulture, it would be a benefit to the country to promote their settlement and improvement by permanent residents, it not being the policy of the United States to keep such lands open for exploration for an indefinite period, from the mere possibility that some day or other gold, silver, cinnabar, or copper might be discovered thereon.

* * * * * * * * * *

If a tract, say forty acres, has a mine upon it occupied and worked by the occupant in pursuance of the mining customs there certainly can be no trouble in proving the fact, and it required no tedious and expensive investigation to determine whether the same is subject to entry under the pre-emption or homestead law. If, on the contrary, the adjoining forty-acre tract is well adapted for farming or gardening, and has never had thereon a mine, and presents no positive indications of valuable deposits of precious metals, the facts are capable of ready proof.

A certain subdivision either has a mine upon

it, and is occupied by miners in pursuance of the mining customs of the district, or it is not improved and occupied as a mine. In either case the facts may be readily and satisfactorily established by proof. If it is occupied as a mine, or if a vein of quartz or other rock in place, bearing gold, silver, cinnabar or copper, has there been traced, it is mineral land; but if it has no existing mine upon it, and no metalliferous vein of quartz or other rock is known to pass through or penetrate the tract, the land is not properly classed as mineral, although, contrary to present indications, gold, silver, cinnabar or copper may at some future time be discovered upon it."

2 Lester's Land Laws, 347.
Annual Report, 60–1.

In a letter to Hon. G. W. Julian, dated February 5, 1870, the department says:

"Where a deputy surveyor returns land as 'mineral' it can then only be entered as 'agricultural,' by proving the return to be erroneous. * * * The returns of the surveyor are not, of course, based upon underground explorations, but upon mere surface indications, and the counter testimony of the agricultural claimant would be to the effect that, according to such indications, the land is more valuable for agriculture than for mining. He is not required to prove that no mineral exists, but simply that its general appearance indicates its chief value to be for farming or gardening purposes.

2 Lester's Land Laws, 395.

After the passage of the mining acts, approved July 9, 1870, (16 Stat. 21) and May 10, 1872,

(17 Stat., 91) other circulars of instruction were sent out by the department, modifying the existing practices to conform to the altered laws; but no change in the definition of the term "mineral lands" was required by these further acts, and no change was made in this respect in the new instructions.

Circular of May 6, 1871, Copp's U. S. Mining Decisions, 261.
Circular of March 20, 1872, Copp's U. S. Mining Decisions, 311-2.
Circular of June 10, 1872, Copp's U. S. Mining Decisions, 270.
Circular of June 15, 1873, Copp's U. S. Mining Decisions, 316–7.

After the various mining acts were codified into the revised statutes, still other instructions were issued from time to time, but leaving unmodified the construction of the terms as originally given.

Circular of Feb. 1, 1877, Weeks on Mineral Lands, 526–539.
Circular of April 1, 1879, Sickles Mining Laws and Decisions, 524, 548.
Circular of April 27, 1880, id. 558.
Circular of Sept. 23, 1880, id. 561.
Circular of October 29, 1881, p. 30.
Circular of December, 10, 1891, p. 36.

The first section of the act of May 10, 1872 (17 Stat. 91), is a congessional recognition and confirmation of the pre-existing departmental

definition of mineral lands as lands more valuable for mining than for agricultural uses. This definition had been repeatedly announced in circulars of instructions, decisions, and in the annual reports; and when we find that the first section of this act opens to exploration and purchase "all *valuable* mineral deposits, and the lands in which they are found, to occupation and purchase," it is impossible to resist the conclusion that the term "valuable," here first incorporated into the law, was so incorporated in recognition and confirmation of the existing construction. And this is the evident understanding of the department, as in the circular issued June 10, 1872, under this act, it is said "that the first section of the act *leaves* the mineral lands in the public domain, surveyed or unsurveyed, open to exploration, occupation and purchase."

Copp's U. S. Mining Decisions, 274.

Of the meaning of the term "valuable" as here used, the commissioner says:

"The meaning of the word valuable need not be discussed. Anything a person is willing to give money for, or that is useful or precious, or that has merchantable qualities, is valuable."

Circular of July 15, 1873, Copp's U. S. Mining Decisions, 316.

As no one would give money for land as mineral ground until the mineral was discovered or

unless there were such obvious indications of the existence of metal as would lead a reasonable, experienced miner to invest in the expectation of obtaining the metal in paying quantities; and as an undiscovered mineral deposit is neither useful nor precious, and is totally without merchantable qualities, "mineral lands" are lands containing known mines or such obvious indications of the existence of the mineral deposits as to render them of greater value for mining than for agricultural uses. This definition necessarily includes the idea of change in the quality, as the mines are worked out, new deposits discovered, improved methods of mining invented, or as the value of the land for agricultural uses varies.

After the passage of the act of May 10, 1872, this construction was embodied in a non-mineral affidavit required of agricultural claimants. In this affidavit, required of all agricultural land entrymen, in what are known as the mineral states, the affiant swears:

"That he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, *to his knowledge*, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper,

or any deposit of coal; that there is not, within the limits of said land, *to his knowledge*, any placer, cement, gravel or other valuable mineral deposit."

Copp's U. S. Mining Decisions, 335.

Not only is this definition of "mineral lands" with its consequent variability under altered circumstances, adopted by the department in its circulars and reports, but it has been and is the basis of departmental decisions in determining contests and issuing patents. Upon its soundness must rest the validity of hundreds of agricultural patents issued for lands in mineral states.

In *Kenna v. Dillon*, Copp's U. S. Mining Decisions, 93, the secretary says:

"I think it is fairly established, that though a small portion of the land contained gold in paying quantities, that portion has long since been exhausted and abandoned, and that no part of the tract now contains that metal in sufficient quantities to pay for working; that nearly all the land is valuable for agriculture, and some portions are of unusual fertility" (p. 94).

The mineral application was accordingly rejected.

In a letter dated July 10, 1873, Commissioner Drummond says:

"In reply to the inquiry in your letter of June 15, 1873, I have to state that all mineral deposits discovered upon land, after United States patent therefor has issued to a party

claiming under the laws regulating the disposal of agricultural lands, pass with the patent, and this office has no further jurisdiction in the premises."

Copp's U. S. Mining Decisions, 208.

In an appropriation act approved March 3, 1879, congress provided for the appointment of a commission to codify existing land laws and to report, among other things, such recommendations as they should deem wise, in relation to the disposition of the public lands.

In their report, after a review of the features essential to be recognized in mineral lands, they say:

"It is apparent from these considerations that "a system of administration relating to the "survey and disposal of lands chiefly valuable "for their ores must differ widely from that "relating to arable lands, and hence it is neces- "sary to recognize a class of *mineral lands.*" —Report of the Public Lands Commission, p. xx.

And in the legislation recommended, they recommend the following definition of "mineral lands:"

"All lands which contain veins or lodes of "quartz or other rock in place bearing gold, sil- "ver, cinnabar, lead, tin, copper, coal, iron or "other valuable deposit (and which are rendered "thereby more valuable for mineral than for "agricultural purposes), shall be classified as "mineral lands; and the same shall be subject

" to entry and sale only under the provisions of " the mineral laws." (Id., LXIII.)

This proposed definition of mineral lands was drawn from existing laws, decisions and departmental regulations.

Dughi v. Harkins, 2 L. D., 721, was a contest between mineral and agricultural claimants. The land had been returned as agricultural by the surveyor. Secretary Teller, in deciding the case, says:

"The burden of proof is therefore upon the mineral claimant, and he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, *but that, as a present fact, it is mineral in character*, and this must appear from actual production of mineral, and not from any theory that it may produce it; in other words, it is fact and not theory which must control your office in deciding upon the character of this class of lands. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value. He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value."

In *Commissioners of King County v. Alexander*, 5 L. D., 126, Mr. Secretary (now Justice) Lamar says:

"It has been repeatedly held by this department that the proof of the mineral character of

land must be specific and based upon the actual production of mineral; that it is not enough to show that neighboring or adjoining lands are mineral in character, and that the lands in controversy may hereafter develope minerals to such an extent as to show its mineral character, but it must be shown as a present fact that the lands are mineral, and this must appear from actual production of mineral and not from a theory that the lands may hereafter produce it."

In *Creswell Mining Co. v. Johnson*, 8 L. D., 440, Secretary Vilas says:

"The question to be determined from this testimony is not whether the land is mineral in character, but whether the mineral character is such as to make the land more valuable for mining than for agricultural purposes, or whether the mineral character is shown to be such as to warrant the conclusion that the minerals might be obtained with the aid of known means and appliances in sufficient quantities and of such values as to make it more profitable for mining than for agriculture.

It cannot be questioned that the land contains minerals and that the assays of the ores taken from said mines have shown sufficient value to indicate that said land would be valuable for mining, provided ore of that value can be obtained in sufficient quantities, and extracted and worked at a sufficiently low figure. But, as already indicated, evidence on these points is wholly wanting.

It is contended by the protestant that mining operations on said lands can be made more profitable than agriculture by future development, and the application of proper machinery.

The opinion of witnesses to this effect seems

to be based solely upon the assay of ores taken from said mines, and not upon practical results shown by working them" (p. 441).

And again:

"The burden of proof being upon the protestants, they were required to show by a preponderance of testimony that the land is more valuable for mining than for agricultural purposes as a present fact; not that it might possibly hereafter develop minerals in such quantity, and of such a character, as to establish its mineral value" (p. 442).

To this same effect see also:

Townsite of Deadwood, 8 Copp's L. O., 155.
W. H. Hooper, 1 L. D., 560.
Caledonia M. Co. *v.* Rowen, 2 L. D., 717, 720.
Magalia Gold M. Co. *v.* Ferguson, 3 L. D., 234.
Roberts *v.* Jepson, 4 L. D., 60.
Cleghorn *v.* Bird, 4 L. D., 478.
Magalia Gold M. Co. *v.* Ferguson, 6 L. D., 218.
John Downs, 7 L. D., 73.
Pierano *et al. v.* Pendola, 10 L. D., 536.
John E. Williams, 11 L. D., 462.
Savage *et al. v.* Boynton, 12 L. D., 612.
Royal K. Placer, 13 L. D., 86.
Walton *v.* Batten, *et al.*, 14 L. D., 54.
Winter *et al. v.* Bliss, 14 L. D., 59.

As a corollary to these propositions it is necessarily held that if at the time the title to land, whether the legal or the perfect equitable title

upon entry and payment of the purchase price, passes from the government to its grantee, the land is not then more valuable for mining than for agricultural purposes, under the then apparent existing conditions, it will pass as agricultural land, notwithstanding "mineral lands" are excluded from disposition under the law by virtue of which the title is passed; and if the land does, in the future, develop minerals in such quantities as to render it mineral, the vested title, nevertheless, remains perfect in the grantee, not only to the land, but also to the minerals. Says the department:

"In order to defeat the entry, on the ground of mineral character of the land, it must be shown that mineral was known to exist at the time of the entry, and a discovery of mineral made, as in this case, more than four years after the allowance of the entry, will not warrant its cancellation."

Harnish v. Wallace, 13 L. D., 109.

See also:

Nancy Ann Caste, 3 L. D., 169.
Nicholas Abercrombie, 6 L. D., 393.
James K. Jacks, 7 L. D., 570.
Thomas J. Laney, 9 L. D., 83.
Plymouth Lode, 12 L. D., 513.

By the sixth section of the act approved March 3, 1853, (10 Stat. 246) congress granted to the State of California sections 16 and 36 in every

township for school purposes. "Mineral lands" were excluded from this grant. The grant is *in praesenti*, and takes effect upon the identification of the sections by survey. In *State v. Poley & Thomas*, Sickles Mining Laws and Decisions 426, s. c. 4 Copp's L. O., 18, this question, as stated by the secretary, was presented: "Did the title to lands in said sections vest in the state, upon survey, if their mineral character was unknown at the time, and the same were regarded by the officers of the government as ordinary public lands, not reserved or otherwise appropriated, but subject to disposal under the general laws of the United States?" In answering the question Mr. Secretary Schurz says:

"In compliance with the doctrine established by the courts, it must, I think, be held that the title vested in the state at the date of the survey, when the land was not known to be mineral, or was not treated as such by the government.

If, following the doctrines of the courts, the grant of school lands takes effect at the date of survey, can the character of the land, subsequently determined, change or affect said title? If it can, for how long a period can such change be affected? If for three years, why not for ten or fifty, or after the title derived from the state has been transmitted through numerous grantees? For lands confessedly not mineral at the date of survey, may, many years thereafter, be ascertained, through the improvements in mining operations, to be valuable as mineral lands. To maintain such a doctrine might re-

sult in placing in jeopardy the title held by grantees to all the school lands in California, and could only be authorized by the most positive and clearly expressed provisions of law. In my opinion, there is nothing in the act which can thus be interpreted. I must, therefore, hold that the discovery of the mineral character of the land in sections 16 and 36, subsequent to survey, does not defeat the title of the state to the same as school lands."

This construction has since been uniformly followed in adjusting these school grants. See:

J. Dartt, 5 Copp's L. O., 178.
Letter to James Craig, dated April 30, 1879, 6 Copp's L. O., 45.
Townsite of Silver Cliff v. State, 6 Copp's L. O., 152., s. c. Sickles' Mining Laws & Decisions, 430.
Virginia Lode, 7 L. D., 459.

Samuel W. Spong, 5 L. D., 193, decided in October, 1886, was an appeal to the secretary of the interior from a refusal to allow an application to enter a quartz mine. The local officers rejected the application because the land had been patented to the Central Pacific Railroad Company under the Pacific Railroad Acts. The commissioner of the general land office affirmed this ruling upon the ground that the mineral land exception in the grant and in the patent "is construed to mean lands *known* to contain valuable minerals prior to the issuance of the patent, and that subsequent discoveries would

not affect the title of the company to the lands and mines subsequently discovered." The case being appealed to the department, Mr. Secretary (now Justice) Lamar affirmed this ruling. He says:

"The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, *were not mineral at the date of the issuance of said patent.* * * * * While the exception of mineral lands from the grant to said company is clear and explicit, yet it does not appear from a careful consideration of the language of said grant that congress intended to grant only such lands which may, after the lapse of an indefinite number of years, prove to be agricultural in character."

As in this case the patent issued prior to the discovery of the mineral, it was not necessary to decide what the effect of a discovery prior to patent, but subsequent to definite location, would be. It may be noted that this is the same case decided by Judge Sawyer under the title of Cowell v. Lammers, 21 Fed. Rep., 200, hereinbefore referred to.

In *Abraham L. Miner*, 9 L. D., 408, the department discusses very elaborately the question presented in *State v. Poley & Thomas, supra.* After a review of preceding decisions, both court and departmental, the conclusion is reached that

the title to sections 16 and 36 passes under the grant by the act of March 3, 1853 (10 Stat., 244), to the state upon their identification by survey, if they were not then known to contain mineral; and that a subsequent discovery would not divest the title previously vested. Says the secretary:

"The title having once passed to the state, the land is from that time subject to disposal by the state, and to allow the title to be divested by the subsequent discovery of the mineral character of the land would not only, as shown by Secretary Schurz in the quotation above, work great hardship and injustice to the state's grantees and render insecure title to school lands in said state, but would also be contrary to the settled policy of the government in this particular" (p. 411).

After reviewing of the court decisions hereinbefore referred to, the opinion continues:

"As the title vests at the *date of sale*, in preemption and private cash entries, and, according to the established doctrine of the courts, the title of the state vests in school lands at *date of survey*, the principle announced in the foregoing case is applicable to the case under consideration and those cases are authority for the proposition, that the discovery of the mineral character of school lands after the title has passed to the state on survey thereof will not affect or divest that title. The reasons for the application of the rule to school land grant cases, stated by Secretary Schurz, in State of California *v.* Poley & Thomas, *supra*, are as cogent as (and similar to) those

laid down by the Supreme Court of the United States in cases of acquisition of title to public lands by preemption, cash entry or otherwise. The decisive question in all these cases is, has the title vested? If it has, not only the policy of the government as indicated by congressional legislation, but also the wholesome spirit pervading the common law in favor of the quieting of titles, steps in and forbids the setting aside of such title, because of facts subsequently developed and which were unknown when the title passed. It is better that the lesser evil of lands in fact mineral being acquired in a mode different from that prescribed by law for the acquisition of lands known to be mineral, should be submitted to, than that the title to the state should in cases of subsequent discovery of mineral be divested, thus unsettling all titles to school lands, both to and from the state, lessening the value of such lands in the hands of the state and its grantees in all cases, and in some cases depriving innocent purchasers entirely of their vested rights" (p. 412.)

Referring to the case of *Samuel W. Spong, supra*, the secretary adds:

"The holding that the discovery of mineral after issue of patent would not affect the title, does not conflict with the doctrine laid down in the present case. If such discovery at any time after survey, in case of school lands grants or after the company's title attached under a railroad land grant, would not affect the title, *a fortiori*, it would not after patent. This is true of all the cases in which the words 'known to be valuable for mineral prior to patent' (or of similar import), are used, and in none of these cases is it held or intimated that the discovery of the

mineral character of land after the title has vested by survey or otherwise (as the case may be), and before patent, would divest the title which had passed prior to such discovery. This precise question was not involved in said cases."

In *Central Pacific R. R. Co. v. Valentine*, 11 L. D., 238, decided August 30, 1890, Secretary Noble decided that "the discovery of the mineral character of the land at any time prior to the issuance of patent therefor, effectually excludes such land from a railroad grant which contains a provision excepting all mineral lands therefrom." The secretary says:

"The exception from the grant is explicit, unequivocal and alsolute. It is 'that all mineral lands shall be excepted from the operation of this act.' There can be no reasonable question about the interpretation of this language. It clearly means that no 'mineral lands' were granted or intended to be granted by the act. The discovery of the mineral character of lands within the lateral limits of the grant, after the date when it acquired precision, only proves that such lands were always mineral lands, and serves to bring them clearly within the excepting clause of the grant. They are, and were, no less 'mineral lands' because not *known* to be such, at the date of the grant, or at the date when it acquired precision."

In *Northern Pacific R. R. Co.*, 13 L. D. 691, and *N. P. R. R. Co. v. Champion Con. M. Co.*, 14 L. D., 699, Mr. Secretary Noble reiterates this ruling.

Summary of Executive and other Construction.

Briefly summarizing these decisions, the following propositions may be considered as settled :

(1.) That the lands valuable by reason of the ores contained have, since the beginning, been set apart as a class by themselves, and, under one designation or another, have been reserved from disposal as ordinary agricultural lands.

(2.) That the term "mineral lands" or "mines" as used in the various acts of congress excluding such lands from disposition under those acts, have common and uniform meaning in the various acts. (3.) That "mineral lands" include only lands more valuable for mining than agriculture. That the various phrases excluding "mineral lands," from the different acts of congress, do not include all lands containing metal in quantities sufficient to render the land more valuable for mining than for agriculture ; but only such of these lands as, at some certain period, are known to contain the metal, or where there is such indications of its existence as will justify a prudent, reasonable and experienced miner in expending money and labor in legitimate mining operations to develop such minerals, diverting for that purpose the land from other pursuits.

Leaving out the case of *C. P. R. R. Co. v.*

Valentine, 11 L. D., 238, and the few subsequent railroad land grant cases following that authority, the departmental construction fixes the time when land must be known to be mineral to be excluded from the operation of the agricultural land laws, as the time when the title, if it be non-mineral, vests in the grantee. Like the construction by the courts of these acts, these decisions fully settle that the quality of any specific tract, as mineral or not, may vary.

With the possible solitary exception of the *Valentine* case, and the railroad land grant cases subsequently decided upon the authority of that precedent, there is no conflict in the great volume of decisions, court and departmental, as to what is mineral land. That land only is "mineral land" within the meaning of these exceptions which is more valuable for mining than for agriculture or other uses, such value to be determined in view of the known or reasonably apparent condition of the land at the time when its mineral character is material, to wit, when the title passes from the Government to the grantee.

Here three questions arise, the answers to which must determine this cause:

FIRST.—Is this uniform construction of the mineral land exceptions correct?

SECOND.—Is the "mineral land" proviso in

the railroad land grants to receive the same construction as the similar provisions excluding such lands from the operation of the various other land laws?

THIRD.—If so, when does the title to the specific tracts of land vest under these grants?

1.

IS THIS UNIFORM CONSTRUCTION OF THE MINERAL LAND EXCEPTIONS CORRECT?

Stare Decisis.

It is well to note, before proceeding further in the examination of this question, the circumstances under which it is now presented. It is not a new question, presented for the first time, unburdened by consideration of property rights, but presents itself sustained by all the decisions by the highest and best authorities. It has been a rule of decision in the courts and in the land department for nearly thirty years. It is the foundation of hundreds of titles. Upon its correctness depends the validity of entries and patents for lands now occupied by cities. Deadwood, Leadville, Helena, Butte, every city sprung from a mining camp, is largely located on lands the title to which is based on this con-

struction. If it be erroneous, there is not a tract of land entered and patented under the pre-emption or homestead acts in California or Oregon, nor elsewhere in the United States since the adoption of section 2318 R. S., but is subject to exploration for mines, and, if the mineral be found, to appropriation by the miner. Under far less weighty considerations this court has repeatedly held that the doctrine of *stare decisis* should govern and that a line of departmental decisions standing alone would not be overruled unless clearly erroneous.

"The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it."

Pennoyer *v.* McConnaughy, 140 U. S., 23,
Heath *v.* Wallace, 138 U. S., 582.
U. S. *v.* Philbrick, 120 U. S., 59.
U. S. *v.* B. & M. R. R. Co., 98 U. S. 341.
U. S. *v.* Graham, 110 U. S., 221.
The Laura, 114 U. S., 416.
U. S. *v.* Moore, 95 U. S., 763.
Brown *v.* U. S., 113 U. S., 571.
Robertson *v.* Downing, 127 U. S., 613.
H. & D. R. R. Co. *v.* Whitney, 132 U. S., 366.

Much the more should such considerations be given weight here where the effect of a reversal of that construction would be far wider spread and more disastrous to the nation than in any of the cases cited ; and where the proposition is supported, not merely by a line of departmental decisions, but by every decision of every court (including this court) which has passed upon the question.

Is that construction clearly erroneous ? The eminence and the well earned reputation of the jurists that have sanctioned it, is sufficient answer to this question. Not only is it not clearly erroneous, but a review of the legislation shows it is clearly correct.

Legislation.

The mining laws of the United States began with the reservation in the ordinance of May 20, 1785, of "one-third part of all gold, silver, lead and copper mines, to be sold or otherwise disposed of as congress shall hereafter direct."

The act approved May 18, 1796, 1 Stat., 464, providing for the sale of the lands of the United States in the tertitory northwest of the river Ohio and above the mouth of the Kentucky, required every surveyor to note in his field book "the true situation of all mines." This provision was afterwards incorporated into all laws for

the surveying of public lands; and has been incorporated into the revised statutes, Section 2395. The third section of this act provided that a certain salt spring, describing it, "and every other salt spring *which may be discovered*, together with the section of one mile which includes it," shall be reserved for the future disposal of the United States. As the act provided for the sale of the lands not reserved, this amounted to a declaration of reservation of those salt springs only which were known at the date of the sale; and fairly declared the policy of the government.

In the act approved March 26, 1804, 2 Stat. 277, this policy is even more distinctly announced. The fifth section of the act provided for offering for sale at public auction all the lands in Indiana territory "with the exception of the salt springs and lands reserved for the use of the same," and certain other exceptions named; and such lands as were not bid in, other than those exempted from such offer, were thereafter to be disposed of at private sale. Patents were to be issued for all lands granted or sold. The sixth section provides: "And any grant which may hereafter be made for a tract of land containing a salt spring *which had been discovered previous to the purchase of such tract from the United States, shall be considered as fraudulent and null.*"

Unius expressio alterius est exclusio. A grant of land containing a salt spring undiscovered at date of purchase was valid and passed the title, notwithstanding salt springs and the lands containing them were reserved from sale by the terms of the 5th section. This act is a legislative declaration, not only of the policy of the government, but of the meaning of the excepting term "salt springs." It meant only a known salt spring. Congress did not intend to include in the exception a secret spring that could years after the purchase invalidate the title apparently given.

By the act approved March 2, 1805, 2 Stat., 324, for ascertaining and adjusting the title and claims to lands in Louisiana, three agents were provided to investigate land claims in Louisiana, and it was made their duty to examine into and investigate the titles and claims to lead mines in their district, and to collect evidence as to the value of such mines.

The 8th section of the act authorized the location of certain lands by Major General LaFayette in the district, but provided that no location should include a "salt spring or lead mine.' The act is *in pari materia* with the previous legislation reserving "salt springs;" and that term must be held to include only salt springs known at the date of the sale or loca-

tion. The term "lead mine" would necessarily have the same interpretation. This is the more apparent from the provision for collecting evidence relative to claims to and value of such mines.

By the act approved April 21, 1806, 2 Stat., 391, amendatory of the last mentioned act, the president was authorized to offer at sale the public lands in the western district of the territory of Orleans, "with the exception of salt springs," and other exceptions enumerated.

The act approved March 3, 1807, 2 Stat., 440, respecting claims to lands in the territories of Orleans and Louisiana, confirmed claims, but provided "that no claim to a lead mine or salt spring shall be confirmed merely by this section."

By another act approved on the same day, making provision for the disposal of the public lands situate between United States military tract and the Connecticut Reserve, and for other purposes, all the lands in said district and between the Cincinnati and Vincennes district, with certain named exceptions, were authorized to be sold at public auction or private sale, in the same manner as other lands north of the Ohio and above the mouth of the Kentucky. By the 5th section of this act it was provided:

"That the several lead mines in the Indiana Territory, together with as many sections contiguous to each as shall be deemed necessary by

the president of the United States, shall be reserved for the future disposal of the United States; *and any grant which may hereafter be made for a tract of land containing a lead mine which has been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null*" (2 Stat., 449).

By this act congress clearly declared the term "lead mines" to mean only *known* lead mines.

In nearly all of the acts thereafter passed by congress providing for the sale or location of lands, these exceptions were embodied, either expressly or by implication.

Act approved June 15, 1809, 2 Stat., 548.
Act approved February 15, 1811, 2 Stat., 617.
Act approved March 3, 1811, 2 Stat., 662.
Act approved May 6, 1812, 2 Stat., 728.
Act approved February 17, 1815, 3 Stat., 211.
Act approved March 5, 1816, 3 Stat., 256.
Act approved March 25, 1816, 3 Stat., 260.
Act approved April 27, 1816, 3 Stat., 319.
Act approved April 29, 1816, 3 Stat., 332.

The acts and those defining the term "lead mine" and "salt springs" as including only known mines and salines are strictly *in pari materia.*

And those terms are here used in precisely the same sense. Indeed this intention is apparent in many of the acts themselves. Thus in the act approved April 29, 1816, 3 Stat., 332, exception is made not only of the salt springs and lead mines, but of the quantities of land adjacent thereto which may be reserved by the president; a useless proviso if the mines be unknown at the date of the sale.

By the act approved March 3, 1829, 4 Stat,. 364, the president was authorized to sell the "reserved lead mines and contiguous lands" in the state of Missouri.

By the act approved April 20, 1832, 4 Stat., 505, it is provided that certain salt springs, naming them, "and every other salt spring *which may be discovered* in said territory, with the section of one mile square which includes it, shall be reserved for the future disposal of the United States, and shall not be liable to be entered, located, or appropriated, for any other purpose whatever." This obviously could apply only to salt springs discovered prior to sale of the land by the United States."

By the act approved September 4, 1841, 5 Stat., 456, commonly known as the "preemption act," provision was made for the entry and purchase of public lands. By the 10th section "lands on which are situated any known salines

or mines" were reserved from its operation; also "lands included in any reservation by any treaty, law, or proclamation of the president of the United States, or reserved for salines or for other purposes." If the various prior acts reserving "salt springs," "lead mines," &c., reserved more than the "known salines or mines," the exclusion of reserved lands from the operation of the preemption act is in conflict with the plain implication that where lands are entered and purchased in ignorance of the existence of salines or mines, the title vested in the purchaser remains unimpaired by a subsequent discovery. This congressional interpretation, following the clear implication in the preceding acts, but affirmed the universal understanding of the meaning of these exceptions.

1 Lester's Land Laws, 645.

This legislative construction is conclusive as to the meaning of these terms.

U. S. *v.* Freeman, 3 How., 564.
Endlich on Interpretation of Statutes, sec., 365.

By the act approved March 1, 1847, 9 Stat., 146, congress in the first section provided for the establishment of a land district. Section 2 of the act is as follows:

"That the secretary of the treasury shall

cause a geological examination and survey of the lands embraced in said district to be made and reported to the commissioner of the general land office. And the president is hereby authorized to cause such of said lands as may contain copper, lead, or other valuable ores, to be exposed to sale, giving six months notice of the times and places of sale in such newspapers of general circulation, in the several states, as he may deem expedient, with a brief description of the lands to be offered; showing the number and localities of the mines known, the probability of discovering others, the quality of the ores, the facilities of working the mines, and the means and expense of transporting their products to the principal markets of the United States. And all the lands embraced in said district, not reported as aforesaid, shall be sold in the same manner as other lands under the laws now in force for the sale of the public lands, excepting and reserving from such sales section sixteen in each township for the use of schools, and such reservations as the President shall deem necessary for public uses."

By section 4 it is provided:

"That the said mineral lands shall be offered for sale in quarter sections, and no bid shall be received at a less rate than five dollars per acre; and if such land shall not be sold at public sale at such price, they shall thereafter be entered at private sale at that price."

Section 5 provides for the transfer of the "mineral lands" from the war department to the treasury department. The act approved March 3, 1847, 9 Stat., 179, contains similar provisions.

These are the first acts we have been able to find in which the term "mineral lands" occurs. It is obvious that the lands described in section 4 as "said mineral lands" are the same lands described in section 2. The act, therefore, defines "mineral lands" to be such lands as contain copper, lead or other valuable ores. Not all lands containing ores are to be classed as mineral, but those only whose ores are *valuable;* that is, which contain the ores in quantities sufficient to justify the payment of the increased price, the appropriation of the lands to mining purposes, and the expenditure of money for the extraction of the metal. Knowledge of the existence of the metal in such paying quantities, or apparent indications of such existence, is also a part of this definition. The president is authorized to offer for sale only "such of said lands as may contain copper, lead or other valuable ores." In the notice he is to give "a brief description of the lands to be offered; showing the number and localities of the mines known, the probabilities of discovering others, the qualities of the ores, the facilities of working the mines, and the means and expense of transporting their products to market." Every one of these requirements pre-supposes knowledge of the actual existence of the mines, or of obvious indications of such existence. The ref-

erence to the facilities for working the mines and transporting the products, emphasizes the necessity of value under existing circumstances as an element to be taken into consideration in determining if lands were to be advertised as "mineral." If the facilities for working were such that the land could not be mined, or the means and expense of transportation to market were such that no profit could be derived therefrom by mining, no sale of the land at the increased price could be made, and the president would not be justified in offering the land for sale. The lands that were to be offered for sale, moreover, were only the lands designated as "said mineral lands." The remainder of the lands, those not reported, were to be offered for sale as other lands. They were subject to entry under the pre-emption act. This act plainly defines "mineral lands" as lands known to be valuable for mining purposes, or which contain such obvious indications of the existence of metal as will justify a purchaser in investing his money in the development of the same. The term is used as synonymous with the term "known mines" in the pre-emption act of 1841.

From this time forth the acts of congress relative to mines and mineral lands, with few exceptions, describe the lands simply as "mineral lands." No definition is given the term conflict-

ing with that contained in those two acts. It is used indifferently as synonymous with "known mines" and "lands valuable for mines of gold, silver, quicksilver or copper."

In the act approved September 26, 1850, 9 Stat., 472, these same lands are again described as "mineral lands."

Section 5 of the act approved September 27, 1850, 9 Stat., 496, providing for the survey and making of donations to settlers upon public lands in Oregon, provides:

"That no mineral lands shall be located or granted under the provisions of this act."

Section 10 of the act grants to the territory of Oregon two townships to aid in the establishment of a university; and section 14 provides "that no mineral lands, nor lands reserved for salines, shall be liable to any claim under and by virtue of the provisions of this act."

By the act approved February 14, 1853, 10 Stat., 158, the president was authorized to offer at public sale the public lands west of the Cascade mountains, "excepting mineral lands" and other enumerated exceptions.

By the act approved July 17, 1854, 10 Stat., 305, amendatory of the preceding acts, the preemption privilege granted by the act of September 4, 1841, was extended to the lands in Oregon and Washington territories, surveyed or

unsurveyed, "not rightfully claimed, entered, or reserved under the provisions of this act, or the acts of which it is amendatory, nor excluded by the terms of said act of 1841, with the exception of the unsurveyed lands above mentioned." We think it evident that congress here considered the reservation from sale by the act of 1853 of "mineral lands," did not exclude from entry any lands that would otherwise be subject to preemption entry under the act of 1841, although that act excluded only "known mines." Such was the construction of these acts in *Gold Mining Co. v. Ish*, 5 Or., 104.

The third section of the act approved March 3, 1853, 10 Stat., 244, entitled "An act to provide for the survey of the public lands in California, the granting of preemption rights therein, and for other purposes," provides; "that none other than township lines shall be surveyed when the lands are mineral or are deemed unfit for cultivation." This provision must be so construed as to make it practicable, if possible. Congress is a reasonable body, and must be presumed to have intended, by this provision, a reasonable thing. It is too obvious for argument that the "mineral lands" referred to in this provision were not such lands as contained in their depths metals, the existence of which was unknown, and of which there were no surface indications as

would justify a reasonable man in expending money in their development, or as would give them a market value because of the prospect for mineral. Those townships only were not to be subdivided, the larger portion of which had greater existing market value for mining purposes than for agricultural or other pursuits, a value either because of mines already opened and developed, or because there existed such obvious surface indications of the presence of metal that a reasonable man would feel justified in expending money to develop the same, or would place upon the land a value, based upon the probable existence of metal, greater than its value for agricultural purposes. The surveyor, in determining whether the lands were mineral or not, and whether, therefore, he should run the section lines or not, could be guided only by obvious surface indications, or the actual existence of mines; and the intention of congress was that he should so determine whether the lands were mineral or not, that this should be the criterion. We have said that these mineral lands must be more valuable for mineral than for other pursuits, to be classed as "mineral lands" within the meaning of this provision. There is probably but very little land within the basin formed by the Sierra Nevada and Coast Range Mountains that does not contain more or

less of the precious metals. It is a matter of history that, at the time this act was passed, the mineral belt in California was supposed to be much more extended than it actually is. To have construed the term "mineral lands" as including all these tracts would have prevented the survey of almost the entire state; and this congress knew. It is evident that such was not the intention.

Section 6 of this act provides that the public lands in the state, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which were granted to the state for school purposes, and with the exception of lands appropriated by the act or reserved by competent authority, "and excepting also lands claimed under any foreign grant or title, and the mineral lands," should be subject to the preemption law of September 4, 1841, with all the exceptions, conditions and limitations therein, except as otherwise provided. Congress plainly did not intend the law to be confined in California within narrower limits than elsewhere, and must have used the excepting term "mineral lands" as the equivalent of "known mines" in the preemption act. The survey was a condition precedent to the application of this law. Those lands were to be surveyed that were best adapted to preemption or agricultural purposes. Those lands apparently

best adapted for mining were to be reserved for that purpose. Each township was to be devoted to the pursuit for which it was apparently best fitted. The welfare of the individual and the state would be best promoted by securing from each tract the most profitable return. And it must be presumed that such was the intention of Congress. Land, useless for other purposes, but upon which the miner could make wages, was properly mineral and to be devoted to mineral pursuits; but land from which the agriculturist could obtain bountiful returns for his labor, was not to be reserved from such pursuit, merely because the miner might, for a time, make wages therein. Congress cannot be supposed to have intended such land to be classed as "mineral."

We have also stated that a township in which the lands are to be considered mineral so that the section lines shall not be run, must be a township in which the greater portion of the lands are mineral. Section 6 of the same act, granting sections sixteen and thirty-six in each township to the state for school purposes, excepted therefrom mineral lands, and section 7, providing for the protection of settlers upon such sections sixteen and thirty-six before they were surveyed, provides that no person shall obtain the benefit of this act by settlement or location upon "mineral lands." It is evident from these

two sections that congress anticipated and intended that sectional lines should be run in certain townships, although some of the lands therein might be mineral; and it would be an unreasonable construction to place upon section 3 to hold that that section allowed the running of section lines unless every tract of land within the township was mineral.

By the 12th and 13th sections of this act lands were granted to the state for the use of a seminary of learning and for the purpose of erecting public buildings. From each of these grants "mineral lands" were excluded. The term "mineral lands" as used in these exceptions, must include only the same class of lands as are excluded from the operation of the preemption act, by the use of the same term, in the sixth section excluding such lands from that act as extended to California.

The act of congress approved July 22, 1854, 10 Stat., 308, to establish the office of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers, and for other purposes, provided by section 4 that none of its provisions should "extend to mineral or school lands, salines, military or other reservations, or lands settled on and occupied for purposes of trade and commerce, and not for agriculture." Section 7 provided that

any lands not taken under the provisions of the act should be subject to the operation of the pre-emption act of 1841. It is obvious from this that congress did not regard the reservation of "mineral lands" from the provisions of the act as in any wise inconsistent with the subjecting to entry under the pre-emption act, as one of those provisions, lands not known to contain mines, such lands being subject to entry under the pre-emption act; and the terms must be considered as used interchangeably.

The seventh section of the act approved May 30, 1862, 12 Stat., 410, provides:

"That in regard to settlements which by existing laws are authorized in certain states and territories upon unsurveyed lands, which privilege is hereby extended to California, the pre-emption claimant shall be, and is hereby, in all cases, required, from and after the first day of September, eighteen hundred and sixty-two, to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement: *Provided*, that the provisions of this section shall not be held to authorize pre-emption and settlement of mineral lands, which are hereby exempted from the provisions of this act."

Under the existing laws settlement was authorized upon those lands on which there were "no known salines or mines." It was certainly not the intention to enlarge, by this act, the ex

ception of mineral lands from the operation of the pre-emption law, so as to include more than would be included within the original exception of "lands on which are situated any known salines or mines." Yet such must be the result if the term "mineral lands" here used means more than lands containing "known mines."

In the act approved July 1, 1862, 12 Stat., 489, granting lands to aid in the construction of the Union Pacific railroad, it was provided that "all mineral lands shall be excepted from the operation of this act."

By the act approved July 2, 1862, 12 Stat., 503, donating land to the several states and territories which should provide colleges for the benefit of agriculture and the mechanic arts, there was granted to each of the several states an amount of public land equal to thirty thousand acres for each senator and representative to which such state was entitled: *Provided*, "that no mineral lands shall be selected or purchased under the provisions of this act." In these acts no definition of the term "mineral land" is given; certainly none in conflict with that indicated in the previous legislation; and the term should receive the same construction in these acts as in the previous ones. It certainly would be strange if congress intended to exclude as "mineral lands"

from this grant, that could yet be selected under the grant of 500,000 acres made by the preemption law of 1841 for similar purposes, because they contained no "known mines."

The act approved July 2, 1864, 13 Stat., 356, amending the Union Pacific act, provides:

Section four: "And the term 'mineral land' wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron lands. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preemption, homestead, swamp land, or other lawful, claim, nor include any government reservation or mineral land, nor the improvements of any bona fide settler on any lands returned and denominated as mineral lands."

This act expressly recognizes the fact that the lands must actually be valuable for mineral purposes, and not merely returned as mineral, in order to be within the meaning of the term "mineral lands." It makes a distinction between lands actually mineral and lands returned and denominated as "mineral lands." On the same day was approved the act granting lands to the Northern Pacific Railroad Company, and the term "mineral lands" as used therein, must receive the same definition which it receives in other acts containing similar exceptions, such as the grant to the state for school purposes, and the grant to the Union Pacific Company, unless

there be something in the act itself expressly requiring a different meaning to be applied to the term.

By a joint resolution approved January 30, 1865, 13 Stat., 567, congress provided:

"That no act passed at the first session of the thirty-eighth congress, granting lands to states or corporations, to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant."

To determine the exact intention of congress in adopting this resolution it is necessary to examine into the circumstances under which it was adopted. Many grants had been made during the first session of congress, and from the greater number of these grants mineral lands had been excepted. From a few, however, such exception was inadvertently omitted. This omission it was the desire to cure; and the joint resolution was adopted as a shorter and more convenient means of reaching that end than the passage of a separate amendment to each different act in which the omission was to be cured.

Cong. Globe, 2d Sess. 38 Cong., p. 339.

The resolution does not vary or change the definition of the term "mineral lands" from that

which had previously existed. It simply operates to show that the term "mineral lands" had been used in all previous acts in a common sense. If lands which were not more valuable for mining than for other purposes and so known, were not "mineral lands," this resolution would not prevent such lands passing under an act excluding "mineral lands" from its operation.

In the act approved July 4th, 1866, entitled, "An act concerning certain lands granted to the state of Nevada" 14 Stat., 85, congress provides:

"That the appropriation by the constitution of the state of Nevada to educational purposes of the five hundred thousand acres of land granted to said state by the law of September 4. 1841, for purposes of internal improvement, is hereby approved and confirmed."

Section 10 of the act of September 4, 1841 5 Stat., 456, provides:

"And no lands on which are situated any known salines or mines shall be liable to entry under and by virtue of the provisions of this act."

Such lands were, therefore, excluded from the grant of 500,000 acres to Nevada, referred to in the act of July 4, 1866, *supra*.

Morton v. Nebraska, 21 Wall. 600.

Section 2 of said act of July 4, 1866, provides:

"That land equal in amount to seventy-two

entire sections, for the establishment and maintenance of a university in said state, is hereby granted to the state of Nevada."

Section 3:

"That the grant made by law of the 2d day of July, 1862, to each state, of land equal to thirty thousand acres for each of its senators and representatives in congress, is extended to the state of Nevada."

The act of July 2, 1862, 12 Stat. 503, it will be remembered, excluded from the grants made by it "mineral lands;" and such exception must be taken to apply equally to this grant to Nevada. Section 5 provides:

"That in extending the surveys of the public lands in the state of Nevada, the secretary of the interior may, in his discretion, vary the lines of the subdivision from a rectangular form, to suit the circumstances of the country; but in all cases lands valuable for mines of gold, silver, quicksilver, or copper shall be reserved from sale."

In this act the mineral land exception is designated in three different ways: (1.) from the school grant of 500,000 acres by "lands on which are situated any known salines or mines;" (2.) from the agricultural school grant made by section 3 as "mineral lands;" (3.) in the reservation from sale as "lands valuable for mines of gold, silver, quicksilver, or copper." Did congress intend by these various terms to except different classes of land? There could be no

reason for excluding lands from the agricultural school grant as "mineral lands" which would be subject to selection in satisfaction of the grant of 500,000 acres authorized to be applied to educational purposes, because they contained no "known salines or mines;" and we do not believe that lands which would be open to private entry and sale because not "lands valuable for mines of gold, silver, quicksilver or copper," were reserved or intended to be reserved from the school or other grants made in the act as "mineral lands," or because they contained a "known mine." We think the terms "gold, siver, quicksilver or copper" generic terms, and that congress intended thereby to exclude all lands valuable for mines, whatever the nature of the ore. In other states mineral lands were excluded irrespective of the kind of metal contained, and we think the same rule was intended to apply to the state of Nevada. Congress used the phrase "lands valuable for mines of gold, silver, quicksilver or copper" as the equivalent of the term "mineral land," and as excluding only the same class of lands. This is settled by the act approved June 8, 1868, 15 Stat., 67, amending the act just referred to. The first section of the act authorizes the State of Nevada to select the alternate even sections within the limits of any railroad grant in the

state, in satisfaction of the grants made in the following acts of congress, the act of March 2, 1861, organizing the territory, the act of March 21, 1864, admitting the state, and the act of July 4, 1866, *supra*. Section 2 provides:

"That the lands known and designated for the establishment of an agricultural college by the act of July second, eighteen hundred and sixty-two, and the acts amendatory thereto, shall be selected in the same manner *and of the same character of lands* as may be selected in satisfaction of any other grants referred to in the first section of this act. But this act shall not authorize the selection of lands valuable for mines of gold, silver, quicksilver, or copper."

The character of lands subjected to selection under the grants referred to in the first section, varied, unless the terms "mineral lands," "lands in which are situated known mines" and "lands valuable for mines of gold, silver, quicksilver, or copper," are synonymous; and it is evident that congress so considered them. This construction is further confirmed by an examination of the similar grants made to the neighboring states of California and Oregon, where the exception was designated by the term "mineral lands." It is not to be presumed that congress made grants of lands for a university to these states and to the state of Nevada, with different exceptions contained therein. Nor is it to be presumed that lands which would be excepted

from the grant to California and Oregon, would pass under the grant to the state of Nevada; and the term "mineral lands" as used in the grant to the states of California and Oregon, and other states, must be taken to have the same meaning as the exception in the grant to the state of Nevada.

The phrase "lands valuable for mines of gold, silver, quicksilver, or copper," it should be noted, is substantially the same phrase as appears in R. S. 2392, providing that no title shall be acquired under the townsite act, "to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws." This court construing the townsite act, determined that it did not prohibit the passage of the title to mines of gold, silver, cinnabar or copper, which were not known to exist.

Davis *v.* Wiebbold, 139 U. S., 507.

And "lands valuable for mines of gold, silver, quicksilver or copper" can mean only lands where the mineral is found in sufficient quantities to add to their richness and to justify expenditure for its extraction, and known to be so. And as "mineral land" is synonymous, it has the same meaning.

By the act of July 26, 1866, 14 Stat. 251, the existing policy of reserving mineral lands to

the government was changed. The act provides:

"That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation."

The act further provides the method of acquiring title to these lands, which method includes the necessity of expending one thousand dollars in labor on and improvement of the mine discovered. It is obvious from these provisions that by "mineral lands" is meant those lands which contain known mines or such obvious indications of the existence of metal as would lead reasonable men and expert miners to expend money in developing the same. It could not have been the intention of congress to reserve as mineral lands, lands which people would not develop or improve under the provisions of this act.

The 10th section of this act provides:

"That wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the

said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or said parties may avail themselves of the provisions of the act of congress approved May 20, 1862, entitled 'An act to secure homesteads to actual settlers on the public domain,' and acts amendatory thereof."

This section again clearly defines mineral lands as lands upon which have been discovered *valuable* mines of gold, silver, cinnabar or copper. Mines, to render the land mineral, must be *valuable* mines and must have been discovered. The phrase "lands which are properly agricultural," used as it is in contradistinction to lands upon which "no *valuable* mines of gold, silver, cinnabar, or copper, have been discovered," indicate clearly that it was the intention of congress to classify lands as mineral lands or agricultural lands by a test of their value for these respective purposes; and taking this section in connection with sections 1 and 2 of the same act, it clearly confirms the definition which the preceding acts of congress had placed upon the term "mineral land," and which we have heretofore stated, to-wit: lands more valuable for mining than for other purposes, the term "value" being used in the sense of market value. It would not be necessary under this definition, to render lands

mineral, that there must exist paying mines. It would be sufficient that there was such obvious indications of the existence of metal that a reasonable man, having a knowledge of the mining business, would be willing to invest money for the sake of the metal therein contained.

July 9, 1870, this act of July 26, 1866, was amended so as to make placer claims subject to entry under like circumstances and conditions, and upon similar proceedings for those provided for vein or lode claims. (16 Stat., 217.)

The act of May 10, 1872, 17 Stat., 91, to promote the development of the mining resources of the United States, repeals several sections of the act of 1866, and among others, the 1st section, and enacts in place thereof a provision declaring:

"That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase."

At this time the term "mineral lands" had been repeatedly construed by the interior department as including only those lands which contained the metals in sufficient quantities to render them more valuable for mining than for agricultural purposes. This construction had been clearly set forth in the annual reports of

the commissioner; it had been repeatedly announced as a basis of departmental decisions; and it must be presumed to have been known to congress. The enactment, under these circumstances, of the law of 1872, adopting that construction, can only be considered as a ratification and confirmation thereof.

St. P. M. & M. Ry. Co., 8 L. D., 265.
C. P. Masterson, 7 L. D., 174.
N. P. R. R. Co. *v.* St. P. M. & M. Ry. Co., 26 Fed. Rep., 562.
Potter's Dwarris, 274, note.
U. S. *v.* N. P. R. R. Co., 41 Fed. Rep., 847.
Endlich on Interpretation of Statutes, sec. 365, *et seq.*

The provisions of this act, with the exceptions made by the act approved February 18, 1873, 17 Stat., 465, were carried into the revised statutes.

Section 2318 R. S. provides:

"In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

By this provision all "lands valuable for minerals" are necessarily withdrawn from the operation of the pre-emption and homestead acts, and those laws are restricted in their operation to a smaller class of lands than they were before the enactment of the revised statutes when only

lands on which are situate "known mines" were excluded from entry under their terms, unless, as has been the uniform construction, the terms of exclusion are synonymous.

The term "mineral land" is found in many other statutes. It is, however, unnecessary here to refer thereto. In none of them is there to be found any indication of an intention to use the words in a sense differing from that in which they are used in the statutes cited. These acts, so far from showing the uniform construction of the term "mineral lands" by the courts and department, to be clearly erroneous, establish that it is correct. This definition of mineral lands necessarily requires knowledge of the mines or such indications of the existence of the metal in paying quantities that the law would presume knowledge of the same on the part of the entryman.

U. S. *v.* Iron Silver M. Co., 128 U. S., 676, 683.
Sullivan *v.* Iron Silver M. Co., 143 U. S., 435, 441–2.
Iron Silver M. Co. *v.* Mike & Starr Co., 143 U. S., 402–3.
Colorado Coal & Iron Co. *v.* U. S., 123 U. S., 327–8.

The mere existence of metal in the land is not sufficient to make "mineral land" within the meaning of that term as used in these various

acts, no matter in what quantity it may exist, any more than it is sufficient to make it "land upon which is situate a known mine," and, obviously, if the land is not "mimeral land" at the time when it is purchased, or when the title passes from the government, a proviso in the law under which the grant is made, prohibiting the disposal of mineral lands under that act, has no application; and a perfect title vests in the grantee.

Should the land thereafter become "mineral land," whether by the discovery of ores contained therein, the existence of which was previously unknown, or by the invention of improved methods of mining, whereby known mineral deposits become for the first time available and a source of value in the land, or by any other change in the conditions, so that the land becomes more valuable for mining than for agricultural purposes, the vested title will not be, by that fact, divested. The proposition will not be disputed that the exception of mineral lands in no case operates to create an estate upon limitation in the grantee from the government, subject to be determined by the land becoming mineral. With the passage of the title the exception is extinguished. To have any effect it must operate to prevent the title from passing out of the government. The title, if it passes at all, is a fee title. Such has been the policy of this govern-

ment from the earliest times; so declared both by legislation and by judicial decisions. Such was the policy declared in the third section of the act of May 18, 1796, 1 Stat., 464, in the fifth section of the act of March 26, 1804, 2 Stat., 277, in the fifth section of the act of March 3, 1807, 2 Stat., 440, the preemption act of 1841, and much other legislation hereinbefore reviewed. That policy is declared in section 2258 R. S., and is now a part of the law of the land.

Says this court:

"A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale."

Colorado Coal Co. v. U. S., 123 U. S., 328.
Deffeback v. Hawke, 115 U. S., 404.
Davis v. Wiebbold, 139 U. S., 524–5.
1 Lester's Land Laws, 645.
State v. Poley & Thomas, Sickle's Mining Laws and Decisions, 426.
Abraham L. Miner, 9 L. D., 411.
Harnish v. Wallace, 13 L. D., 109.
N. P. R. R. Co. v. Walker, 47 Fed. Rep., 683–4.
Francoeur v. Newhouse, 40 Fed. Rep., 620.

2.

IS THE "MINERAL LAND" PROVISO IN THE RAILROAD LAND GRANTS TO RECEIVE THE SAME CONSTRUCTION AS THE SIMILAR PROVISIONS EXCLUDING SUCH LANDS FROM THE OPERATION OF THE OTHER LAND LAWS?

There is nothing in the wording of this exception as it occurs in the railroad grants to call for an interpretation other or different from that which it has received in other acts. In the Northern Pacific act there is granted "every alternate section of public land, not mineral, designated by odd numbers," with a proviso "that all mineral lands be, and the same are hereby excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, may be selected as above provided; *and provided further*, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

The mineral proviso in the Atlantic & Pacific and Southern Pacific grants, by the act approved July 27, 1866, 14 Stat. 292, is the same. The proviso in the Union Pacific act of July 1, 1862, 12 Stat., 489 is, "*Provided*, that all *mineral lands* shall be excepted from the operation of this act." In the amendment to this act of July 2, 1864, 13 Stat., 358 the provision is "the

term 'mineral land,' wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal or iron land. And any lands granted by this act, or the act to which this is an amendment, shall not * * * include any government reservation or mineral lands, or the improvements of any bona fide settler on any lands returned and denominated as mineral lands." In the grants to the California & Oregon and Oregon & California railroad companies, by the act of July 25, 1866, 14 Stat., 239, there is granted "every alternate section of public land, not mineral;" and the 10th section of the act provides, "that all mineral lands shall be excepted from the operation of this act." The Texas Pacific act of March 3, 1871, 16 Stat. 573, grants "every alternate section of public land, not mineral." The joint resolution of January 30, 1865, 13 Stat., 567, provides that no act granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, "shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States." The act of July 13, 1866, 14 Stat., 94, granting lands to aid in the construction of a railroad from Folsom to Placerville,

grants "every alternate section of public land, not containing gold or silver, * * *provided*, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal." The act of March 2, 1867, 14 Stat., 548, granting lands to aid in the construction of a railroad from Stockton to Copperopolis, provides "that all lands containing gold or silver, or copper, be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated lands * * * may be selected as above provided; *and provided further*, that the word 'mineral' when it occurs in this act, shall not be held to include iron or coal." In the last two acts cited the word "mineral" does not occur, except in the proviso that it shall not be held to include iron or coal; and to give that proviso any meaning at all, it must be held that the preceding phrases: in the one act "lands containing gold or silver," in the other, "lands containing gold or silver, or copper," mean all mineral lands, and such must be the construction.

In all of these acts the term "mineral lands" is used as a term with an understood and settled meaning. No attempt is made to define it; such as would undoubtedly have been the case had congress intended the term to receive a dif-

ferent construction in these acts from what it should receive in other land legislation. These exceptions were all made pursuant to a uniform policy to reserve from disposition, except under special laws, the mineral lands. This policy has been uniformly pursued from the beginning of the government until the present time. These various provisions, enacted pursuant to a uniform policy, must be construed *in pari materia*. "Statutes are *in pari materia* which relate to the same person or thing."

The United Society *v.* Eagle Bank, 7 Conn., 456.
Sutherland on Stat. Const., secs. 283–4, 288.
Leroy *v.* Schadollo, 1 Saw., 456.
Saxonville Mills *v.* Russell, 116 U. S., 21.
State of Indiana *v.* Springfield, 6 Ind., 83.
Endlich on Interpretation of Statutes, sec. 53.

The public land system should be considered as a whole. The various enactments are *in pari materia*, and must be so construed. Says Attorney-General Wirt:

"The laws upon the subject of public lands are all *in pari materia*, and are all to be construed together; and an authority to an individual to make an entry of any of their lands is not to be considered as an insulated act; but as having relation to the general system, and to be expounded according to the meaning of congress,

to be collected from the language of the particular law, as compared with the whole system, and from the reason and nature of the case."

2 Op. Atty. Gen,, 46.
U. S. *v.* Gear, 3 How., 130, 133.
Opinion of Attorney General Berrien, delivered Dec. 8, 1829, 2 Laws, Instructions & Opinions, 52.
Chotard *et al. v.* Pope, 12 Wheat., 587.

And it is to be presumed that the term "mineral lands" is used in these various grants in the settled meaning it had acquired by court and departmental construction and congressional legislation and enactments *in pari materia.*

Sutherland on Stat. Const., secs. 255–6.
Endlich on Interpretation of Statutes, secs. 33, 365, 367–8–9.
Sedgwick on Stat. Const. 225 (2d Ed.)

And much the more does this rule apply where the particular provision under construction is, as here, enacted pursuant to a line of policy early adopted and steadily followed by the government for nearly the entire period of its existence. Under such circumstances only a clear showing of an intention to vary from that policy would justify the court in construing an act as inconsistent therewith. As an example of the weight to be given to this principle of construction in a case like the one at bar, we call the court's attention to the case of *Morton*

v. Nebraska, 21 Wall., 667. This case involved the question of the reservation of salines, a reservation strictly analogous to the mineral reservation, and one which had proceeded side by side with that reservation through the history of our land laws. It was urged that the act of July 22, 1854, 10 Stat., 308, did not operate to reserve the salines in Nebraska territory. The court, after examining the history of preceding legislation, for the purpose of showing the uniform policy pursued, says :

"An intention to abandon a policy which had secured to the states admitted before 1854 donations of great value, cannot be imputed to congress unless the law on the subject admits of no other construction. * * * *

It cannot be supposed, without an express declaration to that effect, that congress intended to permit the sale of salines in territories soon to be organized into states, and thus subvert a long established policy by which it has been governed in similar cases."

Morton v. *Nebraska*, 21 Wall., 669, 671.

And upon these considerations the court construes words of a section confessedly loose and general as creating a reservation of the salines.

In *Mining Co. v. Consolidated Mining Co.*, 102 U. S., 167, we again find this rule of construction given controlling force with reference to this very mineral land reservation policy of the government. Pursuant to this policy the court construes the

grant of sections 16 and 36 to the state of California as excluding "mineral lands," although no express exception of such lands was made in the act. They say:

"Taking into consideration what is well-known to have been the hesitation and difficulty in the minds of congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, *the uniform reservation of them from survey, from sale, from preemption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes besides the 16th and 36th sections, we are forced to the conclusion that congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the state.*"

See also U. S. *v.* Gear, 3 How., 130.
State of Indiana *v.* Springfield, 6 Ind. 83.
Keystone Mining Co. *et al. v.* State, Sickles Mining Laws & Decisions, 423, *et. seq.*; s. c. Copp's U. S. Mining Decisions, 122 *et seq.*
Abraham L. Miner, 9 L. D., 408.

In the case at bar it is not necessary to go as far as the court has done in the cases cited. There are here no loose general words requiring interpretation, nothing is to be implied. We contend merely that a well defined phrase should, in the absence of evidence that congress intended otherwise, receive the same interpretation in

these acts that it does in other acts *in pari materia*, and in which it was incorporated pursuant to the same uniform policy.

Not only is there no evidence that Congress intended these terms to receive a different construction in these railroad grants, but there is a clear declaration of an intent to use these terms in their settled meaning and as they were used in the pre-emption and other legislation. In the proviso in the act before the court in this case, and in several of the similar acts, all lands are divided into two classes, "mineral lands" and "agricultural lands." "Mineral lands" are by clear implication defined as the complement of "agricultural lands;" and nothing which is "agricultural" is "mineral." All lands which are not excluded from entry under the pre-emption or homestead laws as lands containing "known salines or mines" are "agricultural lands."

"The words '*mineral land*' as they occur in the several acts regulating the disposal of the public domain, are used in contra-distinction to the words '*agricultural land*.'"

Report of Commissioner of G. L. O. for 1877, p. 138.
Sickle's Mining Laws and Decisions, p. 434.
Act of July 26, 1866, secs. 10, 11; 14 Stat. 253.
Act of March 3, 1873, sec. 1; 17 Stat. 609.

Act of March 3, 1891, sec. 17; 26 Stat. 1101.
Circular of May 16, 1808, 2 Lester's Land Laws, 321–2.
Annual Report of Commissioner for 1868, 2 Lester's Land Laws, 334, 347.
2 Lester's Land Laws, 395.
See also authorities on pp. 36–39.

And "mineral lands," as the complement of "agricultural lands," must have been intended in these acts to include only lands so excluded from preemption or homestead entry. It is unreasonable to suppose that lands are excluded from these grants as "mineral lands" which, nevertheless, were subject to entry by a preemptioner or homesteader because they contained "no known mines." Such is certainly not the law. It was the intention of congress by the exception of "mineral lands" to reserve and save to the United States lands from which the metals were to be mined. That is the only intention of the exception or reservation. The exception was not for the benefit of the preemption or homestead claimant. Congress does not say to one settler: "The land upon which you have settled, or to which you are seeking to acquire title under the preemption or homestead laws, has been granted and you must, therefore, vacate the same." And to another, no more meritorious or worthy, "The land upon

which you have settled is excepted from the grant because it is mineral, but as there are no known mines upon it, you may acquire title thereto as agricultural land." Yet to precisely these absurdities are we, of necessity, driven, if we give the term "mineral land" in these grants a wider meaning than the term "known mines" in the preemption or homestead laws.

The joint resolution of January 30, 1865, 13 Stat., 567, emphatically declares that a uniform meaning must be given the mineral land exception in every act passed at the first session of the thirty-eighth congress granting lands to states or corporations for any purpose, or extending the time of grants made prior to January 30, 1865, and includes in every such act that exception. An examination of some of the grants made during that session will show how wide this rule of construction announced by congress extends.

April 14, 1864, 13 Stat., 47, congress extended the time permitting states and territories to accept and become entitled to the benefits of the act of July 2, 1862, granting public lands to the various states and territories to provide colleges for the benefit of agriculture and the mechanic arts. And it extends the benefits of the provisions of this act to West Virginia.

By the enabling act for the state of Nebraska,

approved April 19, 1864, 13 Stat., 47, there was granted to that state sections 16 and 36 in each township for the support of the common schools; twenty sections for the purpose of erecting public building; fifty sections for a penitentiary; and seventy-two sections for a university.

By the enabling act for the state of Nevada, approved March 21, 1864, 13 Stat., 30, similar grants were made to that state.

See Copp's U. S. Mining Decisions, p. 30.

So also by the enabling act for the state of Colorado, approved on the same day, 13 Stat., 32. (This act did not become effective by the admission of the state.)

By the act of June 15, 1864, 13 Stat., 132, certain lands were granted to Missouri for the support of schools. Numerous acts were passed during this session enlarging and extending grants theretofore made to aid in the construction of canals, railroads, etc., and new grants were made for the same purpose, including the Northern Pacific grant. This joint resolution is conclusive that the mineral land exception in these acts means the same thing that it does in the grants to Nebraska and Nevada for purposes of common schools, public buildings, etc.; and the same as the similar exception in the act of 1862, grant-

ing lands for agricultural colleges. That the exception from the agricultural land grant by the grant of 1862 differed from the mineral exception in other school grants, or that the mineral land exception in the school or university or public buildings grants to Nevada, Nebraska or Missouri differs in meaning from the same exceptions in the grants for the same purposes to California, Oregon, or the other states, certainly will not be contended. And the exception of "mineral lands" from these grants to California by the act of March 3, 1853, 10 Stat., 238, is precisely the same exception as occurs in the pre-emption act.

Section 9 of the pre-emption act of 1841 appropriates the proceeds of 500,000 acres of land, granted to the states by section 8 thereof, to the construction of railways, canals, improvement of water courses, &c. "Lands on which are situated known salines or mines" are alone reserved from this act. It is apparent that grants of lands made by congress to aid in the construction of railroads are in *pari materia*, and that the exception of mineral lands therefrom is to be construed as excepting the same lands in each case.

Section 18 of the enabling act providing for the admission of Montana, Washington and the two Dakotas, 25 Stat., 681, provides "that all

mineral lands shall be exempted from the grants made by the act." It also provides that if sections 16 and 36, which are reserved for school purposes, are found to be mineral lands, the state, under the direction of the secretary of the interior, is authorized to select other lands in lieu thereof.

Section 13 of the act admitting Idaho contains the same language exempting mineral lands from the grant to that state.

26 Stat., 217.

And the same provision is again found in the enabling act for Wyoming, 26 Stat., 224.

It is the policy of the government to admit the various states upon an equal footing; it is apparent, therefore, that congress used the words "mineral lands" in the enabling acts above referred to as synonymous with the words "known mines" in the pre-emption act of 1841.

Since 1854 six different terms have been used in connection with mineral land exemptions as synonymous, to wit: "exclude," (used in the charter of defendant in error, the Atlantic and Pacific R. R. Co., the Sou. Pac. R. R. Co., and others); "excepted," (used in the charter of the Union Pacific and other railroad companies); "embraced," (used in the joint resolution approved Jan. 30, 1865); "exempted," (used in the

enabling acts of Montana, North and South Dakota, Washington and Idaho); shall not "extend to" mineral lands (used in the act establishing the office of surveyor general for New Mexico, Kansas and Nebraska, approved Jan. 22, 1854); "reserved" (used in section 2318, R. S).

It is very certain that the states of Washington, Idaho, Montana, North and South Dakota and Wyoming will successfully maintain that the provision "all mineral lands shall be exempted from the grants by this act," as found in sections 18 and 13 of said enabling acts, includes only lands in which minerals were known to exist to such an extent as to give them a greater value on that account than they possessed for agricultural or other purposes at the dates the grants attached.

Every argument of public policy which has been suggested in the various decisions of the courts or department as sustaining the uniform construction of this term applies with as great, and, in many cases, greater, force to these railroad grants as to the acts where such considerations have been given great weight. These railroad grants were not made for the purpose of being retained in the hands of the corporations, and by them used for agricultural or other purposes. The limitations upon the corporate powers, inherent from

the nature and purpose of the corporate organizations, restricts the use of these lands by the grantees to the acquisition of the means of constructing and operating the railroads. The policy of congress, as evidenced in the grants, forbade their use otherwise.

Railroad Co. *v.* Courtright, 21 Wall., 315.
Railway Co, *v.* Prescott, 16 Wall., 609.
Act approved July 1, 1862, 12 Stat., 489, Sec. 3.
Joint resolution of May 31, 1870, 16 Stat., 378.

And it being the object and purpose of congress that these lands should pass into the hands of purchasers, and should be farmed and treated precisely as lands acquired direct from the government, it was just as essential that the railroad title, which would be the title of the purchasers, should be as safe and as free from doubt as the title of the pre-emptioner. It is not reasonable to suppose that congress, while giving lands with the sole intention that they should be sold to obtain the means of constructing the road, gave or intended to give a title that would not enable the holder or its grantee to protect the land from the prospector; a title that must defeat the very purpose of the grant, for no sane man would advance a cent upon such an empty shadow.

"What value would there be to a title in one man, with a right of invasion in the whole world? And what property would the owner possess in mineral land—the same being, in fact, to him poor and worthless just in proportion to the actual richness and abundance of its products?" (*Biddle Boggs v. Merced Min. Co.*, 14 Cal., 380.) And while, as said by Secretary Schurz in *State v. Thomas & Poley*, Sickles' Mining Laws and Decisions, 428, to maintain the doctrine that a discovery of mineral in the school grants of sections 16 and 36, after the title had vested in the state upon survey, operated to divest that title, "might result in placing in jeopardy the title held by grantees to all the school lands in California, and could only be authorized by the most positive and clearly expressed provisions of law," this language applies with equal, if not greater force (as the sum total of the railroad grants is greater) to the railroad grants.

See also:

Abraham L. Miner, 9 L. D. 410, 411, 412, 413.
Davis v. Wiebbold, 139 U. S., 525–6.

Every principle of statutory construction requires, therefore, that the exception of mineral lands from the railroad grants, should be interpreted precisely as are the similar exceptions in

other land laws; and such construction is sustained as well by authority as by principle.

In *Ivanhoe Mining Co. v. Keystone Mining Co.*, 102 U. S., 167, the court speaks of the "uniform reservation of them (mineral lands) from survey, from sale, from preemption, and, above all, from grants, whether for railroads, public buildings, or other purposes."

In *Deffeback v. Hawke*, 115 U. S., 392, this court says:

"The preemption act of 1841, excepts from preemption and sale 'lands on which are situated any known salines or mines;' and the act of 1862, extending to California the privilege of settlement on unsurveyed lands, previously authorized in certain states and territories, contained a clause declaring that the provisions of the act 'shall not be held to authorize preemption and settlement of mineral lands.' *Similar exceptions were made in grants to different states, and in grants to aid in the construction of railroads.*"

In *Davis v. Wiebbold*, 139 U. S., 519, the exemption of mineral lands from railroad grants, from grants to states for schools and universities, and from preemption and settlement, are considered as synonymous.

We are required, therefore, by judicial authority, by government policy, by common sense, and the rules of statutory construction, to hold

that the mineral land exception in railroad grants must receive the same construction as in other public land laws.

3.

WHEN DOES THE TITLE TO THE SPECIFIC TRACTS OF LAND VEST IN THE RAILROAD COMPANY?

That the 3rd section of the act of July 2, 1864, makes a grant *in praesenti* is settled. The words "there be, and hereby is, granted" to the company the sections designated, imply that the property itself is passed, not any special or limited interest in it. The title transferred is the legal, as distinguished from the equitable, title. The words also import the transfer of a present title, not a promise to transfer one in the future. The act consequently vested in the grantee the title to the lands granted, *eo instanti*, July 2, 1864, subject to the performance of certain conditions subsequent. No specific lands were, however, described in the act; but means were provided for their future identification. They were to be the alternate odd numbered sections of public land, not mineral, within a prescribed distance on each side of the line of road adopted by the company, and which were public lands on the date the line of said

road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office. Until the route was fixed, the grant was in the nature of a float, and the title granted did not attach to any specific sections until they were capable of identification; but when once identified the title attached to the lands not reserved, as of the date of the grant.

St. P. & P. R. R. Co. v. N. P. R. R. Co., 139 U. S., 5.
Deseret Salt Co. v. Tarpey, 142 U. S., 247.
Wis. Cent. R. R. Co. v. Price Co., 133 U. S., 509.
L. L. & G. R. R. Co. v. U. S., 92 U. S., 741.
Wright v. Roseberry, 121 U. S., 499–500.

When the plat of definite location of the road was filed in the office of the commissioner of the general land office, the sections granted being the nearest odd numbered sections on each side of the line for a certain amount of sections, were identified. Says this court:

"When the line was fixed, which we have already said was by the act of filing this map of definite location in the general land office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been made.

Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for by examining the plats of this land in the office of the register and receiver, or in the general land office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had been attached to any of them. In regard to all such sections, they were not granted. The express and unequivocal language of the statute is that the odd sections *not* in this condition are granted."

K. P. Ry. Co. *v.* Dunmeyer, 113 U. S., 640.
Schulenberg *v.* Harriman, 21 Wall,, 60.
L. L. & G. R. R. Co. *v.* U. S., 92 U. S., 741.
M. K. & T. Ry. Co. *v.* K. P. Ry. Co., 97 U. S., 496–7.
Railroad Co. *v.* Baldwin, 103 U. S., 429.
Wood *v.* B. & M. R. R. Co., 104 U. S., 329.
St. P. R. R. Co. *v.* Winona R. R. Co., 112 U. S., 725.
Barney *v.* Winona R. R. Co., 117 U. S., 232.
Wis. Cent. R. R. Co. *v.* Price Co., 133 U. S., 509.
St. P. & P. R. R. Co. *v* N. P. R. R. Co., 139 U. S., 5.

Deseret Salt Co. *v.* Tarpey, 142 U. S., 248.
Denny *v.* Dodson, 32 Fed., 903.
N. P. R. R. Co. *v.* Amacker, 1 C. C. A., 349.
N. P. R. R. Co. *v.* Wright, 51 Fed. Rep., 70.

The provisions in the 4th section of the Northern Pacific act providing that patents shall issue for the lands granted, do not modify or restrict the effect of the 3d section. The patents under these acts are merely deeds from the government of further assurance, confirmatory of the title acquired by the act itself. They are record evidence issued by the United States that the grantee has complied with all the conditions of the grant; and that the lands are subject to disposal by the railroad company with the consent of the government. They serve to identify the lands patented as coterminous with the road completed, and are a certificate by the government that it has determined by its proper agents the land to be of the nature and status granted by the act. But they do not and cannot add anything to the title granted by the act itself.

Wright v. Roseberry, 121 U. S., 500–1.
Wis. Cent. R.R. Co. v. Price Co., 133 U. S., 510.
St. P. & P. R. R. Co. v. N. P. R. R. Co., 139 U. S., 6.

Deseret Salt Co. v. Tarpey, 142 U. S., 251.
Langdeau v. Hanes, 21 Wall., 530–1.
Denny v. Dodson, 32 Fed. Rep., 904–5.

The title to the specific sections, therefore, vests in the railroad company upon filing a plat of the definite location of the line of the road in the office of the commissioner of the general land office. And if on that day the land is not mineral—that is, is not more valuable for mining than for agriculture, and capable of being shown so to be, and is not within any other exception from the grant—the legal title thereto vests in the railroad company by relation as of the date of the grant; and being so vested, a subsequent discovery of mineral will not divest it.

OTHER CONSTRUCTIONS CONTENDED FOR.

The plaintiffs in error contended in the court below, and we presume will here, that the discovery of mineral of sufficient value at any time prior to the issuance of patent to the railroad company, establishes that the land is within the exception and excluded from the grant. It was admitted, however, that the discovery of the mineral subsequent to the issuance of the patent is immaterial; that with the patent the ques-

tion is closed; that the departmental finding that the land is or is not mineral is conclusive. These views are affirmed by Judge Knowles in his dissenting opinion (Record, 29,). And such is the construction adopted by Secretary Noble in C. P. R. R. Co. v. Valentine, 11 L. D., 238, decided August 30, 1890. We desire to examine the grounds of this contention, and its effect. This contention necessarily concedes "mineral lands" to be not all lands containing metal in paying quanities, known or unknown, but only those lands containing it in such quantities, and which at a certain time are known so to contain it, or give obvious indications of its presence. The contention that the secretary's determination, evidenced by a patent to the railroad company, that a piece of land is not mineral, is conclusive, although a great mine may thereafter be developed in that land, the existence of which was unknown and unsuspected at the date of patent, must necessarily proceed upon one of two theories: either that the law authorized the issuance of such patent, or that a patent issued by the department without authority of law, is valid and passes the title to the land patented. The act authorizes the patenting to the railroad company of only the lands granted, that is, of the "alternate sections of public land, *not mineral*, designated by odd num-

bers" that are otherwise within the terms of the granting act. If the act authorizes the issuance of patents for lands not known to contain minerals at the date of patent, they must be lands "not mineral," as the term is used in the granting act. It is no answer to this argument to urge that the secretary is the tribunal authorized by law to determine the quality of the soil and that his decision thereon is final. Concede, for the sake of the argument, this to be so. The law necessarily presumes the final decision to be correct. The land must be what the final decision says it is. But as the secretary can only say whether it is mineral or not from its known or obviously apparent condition, the law necessarily contemplates he shall decide upon that evidence; and since he is presumed to speak the truth in his decision, it is, under this argument, the known or obviously apparent condition of the land at date of patent that determines if it be mineral or not. And the phrase "mineral lands" means lands known to contain mines at the date of patent, or which, at that time, present obvious indications of the existence of the metal. This, whether they acknowledge it or not, is the necessary definition adopted by all who contend that the patent is final.

The other theory suggested, the only alternative to the foregoing, that a patent issued by

the department without authority of law is valid and passes the title to the land patented is absolutely untenable. A patent, if issued under the act for lands not granted, is a mere nullity, void because issued without authority of law. It may be collaterally impeached and its invalidity shown in any action in which it may come into question. Being an unauthorized act it does not operate to convey the title from the United States, more than a deed executed by one claiming to have a power of attorney from the owner would operate to convey the title if, in fact, no such power had been made. It is as ineffectual as a forgery.

Doolan *v.* Carr, 125 U. S., 618.
W. P. R. R. Co. *v.* U. S., 108 U. S., 510.
Morton *v.* Nebraska, 21 Wall., 674.
K. C. M. & M. Co. *v.* Clay, (Ariz.,) 29 Pac. Rep., 9.
Mullan *v.* U. S., 118 U. S., 278.
Colorado Coal & Iron Co. *v.* U. S., 123 U. S., 325–6.
Steel *v.* Smelting Co., 106 U. S., 452–3.
Smelting Co. *v.* Kemp, 104 U. S., 641.
Miller *v.* Tobin (Or.), 16 Pac. Rep., 163.

And if "mineral lands" in the exception means all lands containing metals in quantities sufficient to warrant their extraction, whether

known or unknown, a patent for such land issued to the railroad company would, by a subsequent discovery of the mineral, be shown to be issued for land not granted and hence void. The discovery would show the title had not passed from the United States; that the patent was unauthorized. If such be the meaning of the exception, no distinction can be made between a patent issued without fraud, but simply through ignorance of the facts on the part of the officials, for lands containing known mines, and a patent for lands containing unknown mines, subsequently developed. This theory further necessarily makes the patent the source of title to lands in which mines are discovered subsequent to issue of patent, and hence is in direct conflict with the decisions of this court, heretofore cited, holding that the patents are but record evidence of the title passed by the grant, and do not and cannot add anything to the rights conferred by the act itself. It also compels those who would assert it, to maintain that while the title to land within plaintiff's grant, the agricultural character of which is unquestioned, and which in fact does not contain minerals, attaches as of the date of the grant, the title to lands which may be discovered to contain minerals subsequent to the issuance of patent passes when the patent issues, and does not attach as of the date of the grant. A construction which,

says Judge Knowles, "can hardly be contended." Record, 42.

We are justified, therefore, in asserting that the necessary definition of the phrase "mineral lands" by Judge Knowles, by the interior department, and by all who assert that the secretary's decision, as evidenced by a patent to the railroad company, that land is not mineral, is conclusive, is: land known to be mineral or such as was apparently so, and generally recognized as such, at the date of patent. The definition of mineral lands given by Judge Knowles in his dissenting opinion (Record, p. 31), "that lands which have a market value for the minerals therein, without any reference to any other character or quality connected therewith, are mineral lands," imports knowledge of the existence of the metals as a necessary part of the definition of the phrase. Manifestly, land cannot have a market value for the minerals therein, if their existence be unknown.

The interior department has, since the decision in the Valentine case, several times held "mineral lands" to be those lands only which can be shown, as a present fact, to be more valuable for mining than agriculture.

Savage *et al*, v. Boynton, 12 L. D., 612.
Royal K. Placer, 13 L. D., 86.
Walten *v.* Batten, *et al.* 14 L. D., 54.
Winters *v.* Bliss, 14 L. D., 59.

Parties holding such doctrines are not in a position to criticise our definition of mineral lands as importing a term, to wit, "known," not found in the act.

The only difference material to this case, since it is conceded that the land in controversy is now mineral, between our definition of the phrase "mineral land" and that of the government and those who urge the secretary's decision is conclusive, is, as we have said, as to the time when the land must be mineral land to be within the exception.

What is the effect of the theory that it is the date of patent, and what are the grounds of that contention?

If it be the known mineral condition of the land at the date of patent that determines if it be within the grant, then the lands granted are not identified so as to attach the title of the company to the specific sections until patent; and the many decisions of this court holding they were identified by filing the map of definite location, were made in ignorance of the law, and must be reversed.

The lands granted by the act of July 2, 1864, are confined to the following:

1.—To public lands on and within forty miles of the line of definite location of the road in the

territories, and within twenty miles of such line in the states.

2.—To the public lands included within odd numbered sections.

3.—To the public lands to which the United States has full title, not reserved, sold, granted, or otherwise appropriated at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office.

4.—To the public lands that are free from preemption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land office.

5.—To the public lands that are not mineral.

The title to all lands falling within these conditions has been vested in the railroad company since July 2, 1864. But until it is susceptible of ascertainment from existing facts, that a particular tract of land does fall within all these conditions, that tract is not, and cannot be, shown to be granted; it is not identified as a portion of the grant. If the line of the road has not been located, the lack of identification is at once apparent and will be conceded. But since it is quite as essential that land should be non-mineral as it is that

it should be within the prescribed distance from the line of the road, the *existence* of the *facts* from which to determine the character of the soil, is quite as necessary for the identification of the land as within the grant, as is the definite location of the road. And as lands would, under this construction, become mineral by discovery of mines therein, or the invention of improved methods of mining, through the operation of which it would be taken out of the class of "vast tracts of country which contain precious metals in small quantities, but not to a sufficient extent to justify their exploitation," and acquire "a market value for the minerals therein," at any time prior to patent, it is obviously impossible to determine, in advance of patent, what their known mineral condition will be at the date of patent; until then the facts essential to the determination do not exist, and the lands cannot be identified.

The title granted would not attach to the specific sections until that time. They would remain until then public lands of the United States. Until identified, and the possibility of their being shown to be without the grant, whether by the discovery of minerals therein, or by a change in their condition rendering their known mineral contents available, as the invention of improved methods of mining, is forever cut off, the rail-

road company cannot acquire more than an impotent contingent or potential interest therein. The United States retains control over the land. Its interest, growing out of the possibility of their becoming known to be valuable for their mineral deposits prior to patent, is such an interest as enables it to subject them to exploration for such minerals, either by itself, or to authorize others to so explore them. This is necessarily so. If congress intended to exclude from the grant all lands found to be mineral prior to patent, it must have intended that they should remain, until that patent, subject to the right of search. Says this court:

> "If their title would not protect them against a discovery of mines in them, neither would it protect them against an invasion of their property for the purpose of exploring for mines."

Davis *v.* Weibbold, 139 U. S., 525.
Opinion of Judge Sawyer, Record, 18.
Opinion of Judge Knowles, Record, 44.
C. P. R. R. Co. *v.* Valentine, 11 L. D. 242–3.

The mining law, R. S. 2319, authorizes, in terms, the exploration and purchase of valuable mineral deposits in "lands belonging to the United States," and it is settled law that it is only the public lands that congress has authority to grant a license to go upon. After lands have

ceased to belong to the United States, the government cannot authorize an entry thereon without the consent of the owner, for the purpose of exploring for minerals.

Francoeur v. Newhouse, 40 Fed. Rep., 624 (Opinion of Judge Sabin).
Davis v. Wiebold, 139 U. S., 528.
Golden Terra M. Co. v. Mahler, 4 Morrison's Min. Rep., 398.
Kendall v. San Juan M. Co., 12 Pac. Rep., 198.
Amador Medean G. M. Co. v. S. S. H. Co., 36 Fed. Rep., 668.
Iron Silver M. Co. v. Campbell, 135 U. S., 286.
Noyes v. Mantle, 127 U. S., 348.
Belk v. Meagher, 104 U. S., 284.
Abraham L. Miner 9 L. D., 408.
North Noonday M. Co. v. Orient Co., 11 Fed. Rep., 125.

And the contention that the odd numbered sections are subject to the possibility of being excluded from the grant upon becoming known to be valuable for minerals at any time prior to patent, with its corollary that they are until that time subject to exploration for minerals under the mining laws, necessarily carries with it the further contention that these lands are, until that time, in the language of section 2319, R. S., "lands belonging to the United States;" with all the conditions and limitations, including exemption from taxation, attendant upon such status.

In the light of these propositions it is evident that Judge Knowles, Secretary Noble and those contending for the second of the two definitions of mineral lands hereinbefore stated, admit the first definition, that it is the known mineral condition at the date the title vests in the grantee that determines if the land pass by the grant, is correct; and the true difference is as to the time when the title vests.

It certainly will not be contended that after title to land has passed from the United States and vested in the railroad company, the land yet remains subject to exploration for minerals by every citizen of the United States, or person who has declared his intention to become such, who sees fit to so explore them; and this, too, under a statute which authorizes the exploration of "lands belonging to the United States" only.

A brief examination of the opinions of Judge Knowles and of the Interior Department will establish that such a proposition is not asserted or contended for by them.

Judge Knowles says:

"Until a patent is issued these lands are not fully identified." (Record p. 40).

"The act of fixing the definite line of plaintiff's railroad had no tendency to determine or identify the nature of the odd sections with-

in plaintiff's grant, although it determined what odd sections were within the limits of that grant. This fixed route was an object from which they could be ascertained, but not the character of these odd sections." (Record p. 42).

"The land department has thus left it to the prospecting miner, up to this date, to identify the mineral lands which are excepted and excluded from plaintiff's grant. Until patents are issued which will identify the lands granted to plaintiff, the government can perform any acts it may think necessary to enable it to identify the mineral lands excepted from plaintiff's grant." (Record p. 44).

As in the same opinion the learned judge quotes from the opinion of this court in *St. P. & P. R. R. Co. v. N. P. R. R. Co.*, 139 U. S., p. 5: "When once identified the title attached to them (the lands) as of the date of the grant," (Record, p. 42), the evident basis of the opinion is that the title did not vest in the grantee until the patents issued. As this court has held in nearly every railroad land grant case it has ever considered, that the title does attach upon filing the map of definite location in the commissioner's office, the reasoning of this dissent fails. And the said judge has, since this opinion, twice held that the lands are identified and the title vests in the railroad company upon filing the map of definite location.

The railroad company recently brought an action in the circuit court for the district of Montana, to enjoin the sale of unpatented lands, claiming, in accordance with this dissenting opinion and the departmental ruling in the *Valentine* case, that the lands were unidentified, that the United States retained an interest therein to enable it to segregate the mineral from the non-mineral lands, and that hence the lands were not taxable. Judge Knowles, sustaining a demurrer to the bill, says:

> "I think it may be asserted safely that, under these recent decisions, plaintiff received a present legal title to the land embraced in its grant, and that said land became identified when the definite route of plaintiff's road was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office, that is: they were then capable of being identified by evidence."
>
> N. P. R. R. Co. v. Wright, 51 Fed. Rep. 70.

Of course, if this identification depended on their known mineral condition at a future time, the date of patent, they were not capable of being identified by evidence, in fact, by nothing less than prophecy.

And in N. P. R. R. Co. v. Amacker, an action in ejectment, decided November 13, 1892, Judge Knowles says:

"Until the road was thus definitely fixed, the grant was in the nature of a float, *then* it received precision and became attached to certain and specific land as of the date of the grant."

Judge Knowles must now be considered as having reversed his dissent.

In *C. P. R. R. Co.* v. *Valentine* 11 L. D., 238, 243, Secretary Noble says:

"It is not questioned that the land department has jurisdiction until patent, or certification, as the case may be, to the company, to determine whether any of the lands within the lateral limits of the grant had been, at the time the line of the road was definitely fixed, 'sold, reserved, or otherwise disposed of,' or was subto 'a preemption or homestead claim,' and therefore excepted from the grant. That such jurisdiction exists, there can be no doubt, and I am unable to perceive upon what principle of logic or process of reasoning it can be claimed that a like jurisdiction does not exist, for the purpose of determining whether the lands are mineral, and for that reason, excepted from the grant. Manifestly, the jurisdiction to determine the exception is the same, whether the inquiry is instituted as to the character of the land, or as to its particular status, at the date when the rights of the company attached under the grant."

In view of the fact that every court, including this one, that has been called to pass upon the question, has decided that a claim or right could only attach to land so as to exclude it from these

railroad grants, by a "a proceeding in the proper office by which the inchoate right to the land was initiated," and that "mere settlement, residence, or cultivation of the land" was not sufficient; and that an inspection of the records is sufficient to determine what lands are granted, so that the duty of determining what is and what is not granted, is a mere ministerial duty not requiring any jurisdiction over the title;

K. P. Ry. Co. v. Dunmeyer, 113 U. S., 640, 644.
Sioux City, etc., Land Co. v. Griffey, 143, U. S., 40.
H. D. R. R. Co. v. Whitney, 132 U. S, 362.
B. & M. R. R. Co. v. Abink, 14 Neb., 97.
S. P. R. R. Co. v. Pursell, (Cal.,) 18 Pac. Rep, 887.
W. P. R. R. Co. v. Tevis, 41 Cal., 493.
A. T. & S. F. R. R. Co. v. Mecklim, 23 Kan., 174.
I. R. R. L. Co. v. Adkins, 38 Ia., 354.
Kiteringham v. Blair &c., (Ia.,) 35 N. W. Rep., 503.
Cahalan v. McTague, 46 Fed. Rep., 251.
Water Mining Co. v. Bugbey, 96 U. S., 165.
Brown v. Corson, (Or.,) 19 Pac. Rep., 70.
Buxton v. Traver, 130 U. S., 232.

and of the further fact that there is not a

word of law anywhere authorizing a contest between an applicant to enter land and one claiming a title already vested, or giving the interior department jurisdiction of such a controversy (*Megerle v. Ashe*, 33 Cal., 89), we must express some surprise at the statement that the jurisdiction of the department until patent to determine if lands were subject to a claim or right (involving, necessarily, control of the title for that purpose) is unquestioned, and that there can be no doubt of the existence of such jurisdiction.

Turning from this criticism, however, we note that the proposition that the department retains jurisdiction until patent, whether to determine the status of the title or quality of the soil, necessarily involves the proposition that until then the land is government land, that the title has not vested in the railroad company, for it is well settled law that the functions of the interior department are confined to public lands, and that when the title to land passes from the government, either by patent, by a grant of specifically described land, or by the identification of a specific tract as falling within the terms of a float grant, all jurisdiction of the land department over the land, and over the title conveyed, ceases.

Moore v. Robbins, 96 U. S., 533.
U. S. v. Schurz, 102 U. S., 402.
Tubbs v. Wilhoit, 138 U. S., 145–6.

Hardin v. Jordan, 140 U. S., 400-1.
Tubbs v. Wilhoit, 14 Pac. Rep., 364.
Howell v. Slauson (Cal.), 23 Pac. Rep., 694.
Langdeau v. Hanes, 21 Wall., 530.

This decision, therefore, and those following it are, like the dissent of Judge Knowles, in conflict with the well established proposition that the survey of the land and filing of the map of definate location identifies the lands granted and attaches thereto the title. It is true that in the language quoted the secretary speaks of the definite location as "the date when the rights of the company attached under the grant"; and again, just preceding the language quoted, as "the date when it (the grant) acquired precision"; but, it is evident that, as these events must necessarily dispense with any occasion to exercise jurisdiction to determine what lands were granted, as well as deprive the department of the power, these words were used without any intelligent comprehension of their meaning, simply because he had seen them in some opinion by this court.

Before quitting our criticism of this opinon it is well to note that the attempted distinction on page 244 between it and the *Abraham L. Miner* case, based upon the fact that there are other than mineral land exceptions from the railroad grant, cannot stand. The exceptions from the

school grant, considered in the *Miner* case, by settlement and reservation, are broader than those in the railroad grants.

A LEGISLATIVE USE OF WORDS WHICH HAVE RECEIVED A JUDICIAL AND DEPARTMENTAL CONSTRUCTION, IS AN ADOPTION BY THE LEGISLATURE OF THAT CONSTRUCTION.

In May, 1868, the interior department decided that "mineral lands" were lands which were known to be of more value for mineral than for agricultural or other purposes.

2 Lester's L. L., 321, 322.
Copp's U. S. Mining Decision, 251.

In 1868, said department also decided that "timber lands on rocky hills and mountains, not known to contain any of the aforesaid minerals, will be designated as agricultural, and, if the contrary, as mineral."

2 Lester's L. L., 334.

Later, during the same year, the department in reference to mineral land, said:

"If it is occupied as a mine, or if a vein of quartz or rock in place, bearing gold, silver, cinnabar or copper, has there been traced, it is mineral land; but if it has no existing mine upon it, and no metalliferous vein of quartz or other rock is known to pass through or penetrate the tract, the land is not properly classed as mineral, al-

though, contrary to present indications, gold, silver, cinnabar or copper may at some future time be discovered upon it."

2 Lester's L. L., 347.

In April, 1864, the supreme court of California decided that lands could not be classed as mineral lands unless, upon the whole, they were better adapted to mining than to agriculture or other purposes.

Ah Yew *v.* Choate, 24 Cal., 567.

Many other departmental and court decisions have been cited in this argument; the above, however, are sufficient to clearly establish the meaning of the words "mineral lands."

Congress, May 31, 1870, passed a joint resolution extending the grant of the defendant in error, authorizing it to build what is now known as the Cascade Branch Railroad, and extending its indemnity limits. Mineral lands are excepted from the operation of said resolution; the language used is "except mineral and other lands as excepted in the charter of said," 16 Stat., 378. This re-enactment is conclusive evidence of the intention of congress to adopt the departmental and court interpretation of the words "mineral lands" as above given, and is binding upon the court in this case, that "mineral lands" include only such lands as, at the date

the title passed under the grant, were known to be, or were apparently, more valuable for the minerals they contained than for agricultural or other purposes.

March 3d, 1887, congress passed an act, entitled, "An Act to provide for the adjustment of land grants made by congress to aid in the construction of railroads," &c., section 1 of which reads as follows:

"That the secretary of the interior be, and he is hereby authorized and directed to immediately adjust, in accordance with the decisions of the supreme court, each of the railroad land grants made by congress to aid in the construction of railroads and heretofore unadjusted."

24 Stat., 556.

Prior to that time this court had decided that the grant to the defendant in error, and all similar grants, were grants *in praesenti*; that such grants were floats until the filing of the map of definite route; and that upon the filing of said map the grants attached to the specific sections; that the title passed by the grant and not by the patent; that the patent added nothing whatever to the title but was a deed of further assurance only, and, as such, evidence of a previous grant.

In 1880, in case of *Mining Co.* v. *Mining Co.*, 102 U. S., 167, this court decided that the grant of sections 16 and 36 to the state of California for

school purposes attached to said sections at the date of the completion and report of the survey, and that said sections then known to be valuable for their minerals were excepted from the grant, thereby holding in effect that such sections not known to be valuable for their minerals passed under the grant.

November 16, 1885, in *Deffeback* v. *Hawke* 115 U. S., 392, this court decided that it was the date of the sale and not the date of the patent which must be referred to in determining the character of lands. The court also held that the land must be known to be valuable for the minerals it contained at the time of the sale, or at the time the title passed, in order to except it from railroad grants and other land laws. In said case this court also said:

"We also say lands *known* at the time of their sale' to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered."

Congress, by said act of 1887, has stamped its approval upon these decisions, and it is now too late to depart from the well established principle laid down therein. It necessarily follows from the foregoing decisions of the courts, departmental rulings and the various statutory constructions, that, in determining whether or

not the land in question passed to the defendant in error under its grant, all the evidence must relate to and bear upon the known quality of the land at the date of the grant and the filing of the map of definite route.

It is now well settled by a long line of decisions in the courts and in the interior department that it is the known condition of the land at the date of sale and not at the date of patent which determines whether, on account of its minerals, it is excepted from the homestead, preemption, school lands, and other state and internal improvement grants.

See *ante*, pp. 9-65

The line of railroad opposite the land in question was completed early in 1883, and, prior to Septemper 7th, 1883, the commissioners appointed by the president to examine and report upon the same, having found that it had been constructed in all respects as required by the granting act, so reported to the secretary of the interior, who approved the report and forwarded it to the president with a request that he approve the same and direct the issuance of patents for the lands coterminous with said section of road. Sept. 7th, 1883, the president approved its report and ordered the patent

to the lands issued; the right to the patent vested at the date of said approval of said report by the president.

M. K. & T. R. R. Co. *v.* Kan. Pac. R. R. Co., 97 U. S., 496.
C. St. P. M. & O. Ry. Co., 5 L. D. 511, 13 Op. Atty. Gen., 114.

November 6th, 1886, after the completion of said section of road and the direction by the president for the issuance of patents for lands coterminous therewith, the defendant in error duly listed the land involved in this controversy and paid the government the listing fees entitling it to such a patent. Said fees were received and retained by the government, and the said list duly approved and certified by the register and receiver to the interior department for patent. The issuing of the patent was a mere ministerial act based upon the conditions existing at the date of the grant, and the filing of the map of definite route.

This closes the question in so far as the company's right to the patent is concerned. At that time the land in question had no market or other value on account of the minerals it contained; it was not known to contain any minerals, and the subsequent discovery of minerals therein could not affect the company's right to a patent which had previously vested

In 1796 congress passed an act requiring every surveyor to note in his field book the true situation of all mines.

1st Stat., Sec. 2, page 466.

Said provision, or a similar one, has continuously been in force from 1796 to the present time. Under such provisions the interior department has continuously required surveyors to note in their field books the character of land, as to whether it was agricultural or mineral. Such returns and notations made in the usual course of administering the public land laws have uniformly been construed to be *prima facie* evidence of the character of land. The land involved in this controversy was surveyed in 1868, and its character as agricultural land noted upon the field book and returns, and such was its condition as shown by the public records at the dates of filing the map of definite route of the Northern Pacific Railroad, the construction of the road, the ordering of the patents issued by the president of the United States, the listing of the land by defendant in error, the payment of the listing fees to the government, the receipt of such fees by the government, and the certification by the register and receiver of said land for patent. Defendant in error, in incurring the expense of listing said lands, and the

register and receiver in accepting said listing fees and approving said lands for patent, each had a right to, and did, rely upon said evidence. Said notation upon the field book and returns is the only means pointed out by congress for ascertaining the character of land. At the time of said certification the plaintiffs in error, and the locators under whom they claim, had no interest in the land involved in this controversy; they had not made any claim or asserted any rights thereto. The question as to whether the land passed under the grant to defendant in error was entirely between the government and the company, and as between them the evidence above referred to was sufficient upon which to base a certification of the selection list for patent, and concluded the controversy in so far as the government and the company are concerned. Such conclusion left nothing whatever for the government to do except the ministerial duty of issuing the patent in pursuance of such grant and certification.

The joint resolution of May 31, 1870, hereinbefore referred to, in addition to extending and enlarging the grant to the defendant in error, authorized it to mortgage its property, including its lands, in order to secure money with which to construct and operate its road. Under said authority defendant in error, in 1887 mortgaged its

land grant and deposited said mortgage in the office of the secretary of the interior in pursuance of a provision of said joint resolution. Said mortgage is therefore a public record of which this court will take judicial notice. At the date of the execution and delivery of said mortgage, and at all times prior thereto, the land had a value as agricultural and grazing land; it had no value for the minerals it contained; it was not known to contain any valuable minerals; it was unoccupied land free from pre-emption, homestead and other claims or rights, except those accruing under the grant to the defendant in error. It was within every provision and condition of said grant, and was shown to be within such conditions by the public record. Defendant in error in executing said mortgage, the trustee in certifying the bonds issued thereunder, and the bondholders in purchasing said bonds had a right to rely upon the records as they then disclosed the land grant of the defendant in error. It is apparent that defendant in error acted in good faith in listing said lands, paying the listing fees, executing and recording said mortgage, and selling the bonds issued thereunder. The subsequent discovery of mineral in said land which it will pay to mine under the improved processes of mining, can neither change the character of the land nor the *bona fides* of the parties acting in relation

thereto at the date of filing the map of definite route, the ordering of the issuance of patent by the president, the certification of said lists for patent and the execution of said mortgage and the sale of the bonds issued thereunder.

At the date of filing the map of definite route of the Northern Pacific Railroad and the construction of the road, the land ceased to be public property and became private; it became subject to taxation; to levy and sale for the company's debts; to the mortgages aforesaid, and to sale by the company as aforesaid. At said dates the company had a full title in fee simple to said lands, and as the lands had ceased to be public the interior department had lost all jurisdiction over the same except for the purpose of performing the ministerial duty of issuing the patent.

THE QUESTION INVOLVED IN THIS CASE IS ONE OF LAW AND NOT OF FACT. A PATENT ISSUED IN PURSUANCE OF A MISTAKEN CONSTRUCTION OF A PREVIOUS GRANT IS VOID AND CAN BE ATTACKED COLLATERALLY.

The facts in this case are all admitted; the character and physical condition of the land is ascertained; there is nothing for the court or interior department to do but to apply the law to the facts as they are admitted. The de-

termination of the meaning of the words "mineral lands" as used in the charter of defendant in error disposes of this case; if said words are to receive the same construction in the granting act to defendant in error that they have received in all other land legislation, then the judgment must be affirmed. An erroneous decision of the interior department upon this question cannot divest the right which vested in defendant in error upon complying with the conditions of said granting act. Such rights cannot be divested except by a tribunal wherein the proceedings amount to "due process of law;" the proceedings before the interior department do not amount to such "due process of law;" the officers of the department are not authorized to issue subpoenas or other compulsory process to secure the attendance of witnesses; they cannot, after a witness is present, compel him to answer questions; they cannot compel him to submit to cross-examination; they cannot disregard testimony which he may give in chief, notwithstanding his refusal to submit to a cross-examination. The only evidence that can be brought before the tribunal is paid and voluntary testimony. That the proceedings before a tribunal of such limited powers is not "due process of law" is too clear for dispute.

Stimson v. Clark, 45 Fed. R., 762.
Iron Silver M. Co. *v.* Campbell, 135 U. S., 292-3-4.

A "day in court" does not constitute simply presence in court, either in person or by attorney, and listening to the evidence of an adverse party, and in the opportunity to have the testimony of such witnesses as may feel disposed to testify taken. Something more is required —an opportunity to bring out all the facts, both by cross-examination of hostile witnesses and compulsory process to compel the attendance and procure the testimony of witnesses who, although absolutely necessary to the full development of the truth, may be unwilling to testify, are essential. In no other manner can the rights of parties interested be adequately protected. These are of the securities applicable to the determination of questions of right and title recognized by the general law. They are a part of the forms and judicial machinery provided by the wisdom of successive ages for the investigation of the truth of a matter in controversy, described by this court in Chicago, Milwaukee and St. Paul Railway Co. v. State, 134 U. S., 418, as essential to "due process of law." Notice of hearing is useless if, at the hearing itself, the party is stripped of the weapons of defense.

It is apparent, therefore, that congress can not authorize the department to finally determine any questions of fact upon whose deter-

mination depends the right of property vested in the railroad company.

And it is equally clear that congress can not authorize such a tribunal to declare a forfeiture of property rights, or compel a party having such rights to submit them to the jurisdiction of that tribunal under penalty of such forfeiture, whatever it may do with reference to a settler who claims no vested rights.

Nor has congress attempted to vest the department with authority to cite a party claiming vested rights to appear before it in a contest where such rights are necessarily involved. An examination of the law shows that the secretary is charged with the supervision of the public business relating to "the *public* lands, including mines"

Rev. Stat., 441.

By section 453, R. S., the commissioner of the general land office, under the direction of the secretary of the interior, is authorized to perform all executive duties pertaining to the surveying and sale of the *public* lands of the United States or in any wise respecting such lands, and also such as relate to private claims of lands and the issuing of patents for all grants of land under the authority of the government. No jurisdiction is given the officials of the department over

lands not public, other than for the performance of the ministerial duty of issuing patents for lands theretofore granted; and when lands cease to be public, the departmental jurisdiction thereover ceases also.

See authorities cited on it, pp. 136–7.

See also Wright *v.* Roseberry, 121 U. S., 488.
Steele *v.* Smelting Co., 106 U. S., 447.
Smelting Co. *v.* Kemp, 104 U. S., 636.
Morton *v.* Nebraska, 21 Wall., 660.
S. P. R. R. Co. *v.* Wiggs, 43 Fed. R., 333.

The decisions of the department in such cases are not final or conclusive.

Iron Silver Min. Co. v. Campbell, 135 U. S., 286.
Wright v. Roseberry, 121 U. S., 488.
Morton v. Nebraska, 21 Wall., 660.
R. P. R. R. Co. v. Wright, 51 Fed. Rept., 71.
N. P. R. R. Co. v. Amacker, decided by U. S. Circuit Court for district of Montana, Nov. 13, 1892, not yet published.
Miller v. Tobin (Or.), 16 Pac. Rep., 162.
Smith v. Ewing, 23 Fed. R., 742.
Wilson v. Fine, 40 Fed. R., 52.
Stimson v. Clarke, 45 Fed. R., 760.
Megerle v. Ashe, 33 Cal., 89.

Inasmuch as the facts are all conceded, the character of the land at the date the grant attached fully ascertained to be agricultural and falling

within all the terms and conditions of the grant to defendant in error, a title in fee simple having vested in defendant in error, a patent, if issued to the plaintiffs in error by the department, would be the result of a misconstruction of the law after the land had ceased to be public and became private; such a patent would be void and subject to attack collaterally.

Doolan v. Carr, 125 U. S., 618.
Wright v. Roseberry, 121 U. S., 488.
Steel v. Smelting Co., 106 U. S., 447.
Smelting Co. v. Kemp, 104 U. S., 636.
Stoddard v. Chambers, 2 How., 262.

Since the department cannot render a final decision as against one claiming prior vested rights, defendant in error can attack the patent issued even in cases where the facts are controverted.

Iron Silver Min. Co. v. Campbell, 125 U. S., 286.
Wright v. Roseberry, 121 U. S., 488.
Miller v. Tobin (Or.), 16 Pac. Rep., 162.
Branch v. Mitchell, 24 Ark., 431.
Kernan v. Griffith, 27 Cal., 87.
Megerle v. Ashe, 33 Cal., 83, 89.

Plaintiffs in error in the court below claimed, and we presume they will claim here, that a full title in fee simple does not pass to the defendant in error by virtue of its grant and a compliance with the terms thereof. However, they

have never furnished us with a definition of the part of the title which does not so pass. They also claim that said undefined and undefinable portion of the title does not pass until the patent is issued; hence they say that defendant in error has not a title, prior to the issuance of patent, upon which an action of ejectment can be maintained. The proposition that a full title in fee simple passes by railroad and other grants *in praesenti*, upon a full compliance with the terms and provisions thereof on the part of the grantee, upon which an action of ejectment can be maintained before patent is issued, is too well settled to admit of further discussion or controversy.

The Supreme Court of Montana in case of *Northern Pac.* v. *Majors*, 2 Pac. Rep., 362, said:

"A grant of lands by the government is a higher evidence of title than a patent; it is tantamount to a conveyance with livery of seizin and will support ejectment."

In said case the charter of the defendant in error is carefully reviewed and the authorities bearing upon this question, decided prior to 1884, are thoroughly and carefully considered. Said case was approved by the same court in case of *Nor. Pac. R. R. Co.* v. *Lilly*, 9 Pac. Rep., 176. In each of

said cases an action of ejectment was maintained for land claimed adversely but falling within defendant in error's grant, and to which no patent had been issued. This court, in case of *Buttz* v. *N. P. R. R. Co*,, 119 U. S., 55, reached the same conclusion, and held that an action of ejectment could be maintained by the company prior to the issuance of patent, based entirely upon its grant and the compliance therewith.

N. P. R. R. Co. v. Amacker, 1 C. C. A., 353.
See also Denny v. Dodson, 32 Fed. Rep., 899.
Nor. Pac. R. R. Co. v. Wright, 51 Fed. Rep., 71.
N. P. R. R. Co. v. Cannon, 46 Fed. Rep., 225.
N. P. R. R. Co. v. Amacker, 46 Fed. Rep., 233.
Cahalan v. McGague, 46 Fed. Rept., 251.
N. P. R. R. R. Co. v. Meadows, 46 Fed. Rep., 254.

The foregoing propositions establish very clearly the correctness of the able and exhaustive decisions rendered by Circuit Judge Sawyer in this case in the court below. (Rec. 13.)

Respectfully submitted,

JAMES McNAUGHT,
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Counsel for Defendant in Error.

To be returned to Office Sup. Court U.S.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

NO. 908.

RICHARD P. BARDEN, et al.,
Plaintiffs in error,

vs.

NORTHERN PACIFIC R. R. CO.,
Defendant in error.

In Error to the Circuit Court of the United States for the District of Montana.

Supplemental Brief for Defendant in Error.

JAMES McNAUGHT,
For Defendant in error.

LIVINGSTON MIDDLEDITCH CO., Printers, 149-153 Leonard Street, N. Y.

RICHARD P. BARDEN, *et al.*,
Plaintiffs in Error,

vs.

NORTHERN PACIFIC R. R. Co.,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

"MINERAL LANDS."

The words "mineral lands," as used in the charter of defendant in error and the land legislation of this country, constitute the foundation of this case; their definition by this court substantially disposes of this controversy. Five definitions are offered, to wit:

1.—By defendant in error: "that 'mineral lands' as used in this and similar legislation, are lands more valuable for mining than for agricultural uses, such value to be determined in view

of the known or reasonably apparent condition of the land."

2.—By Assistant Attorney General Shields; "we usually characterize lands by those qualities which predominate; we say swamp lands where the greater part of a legal subdivision is swamp or overflowed; desert land where the greater portion of a legal subdivision is arid, and there is no reason why we should not describe as mineral, land which has a special value on account of its minerals."

3.—By Toole & Wallace: "Such as have a market value for the mineral therein without any reference to any other character or quality thereof."

4.—By Dixon & Morris: "Such as indicates the existence of minerals concealed within its interior."

5.—By Senator Sanders and the Attorney-General: "All lands which contain metals in quantity sufficient to pay for their exploitation are mineral lands."

The first of said definitions is sustained by the decisions of every court and by every departmental and executive officer passing upon the question.

Twenty-four decisions of the courts and fifty-

three departmental and executive rulings sustaining said definition are cited from pages 9 to 61 inclusive in our original brief. Since the filing of our original brief, and while the controversy between counsel for plaintiffs in error as to meaning of the term "mineral lands" was going on, the interior department rendered a decision in the case of *Berry v. Central Pacific R. R. Co., 15 L. D., 463*, fully sustaining said first definition. The Secretary of the interior, among other things said :

"In the case of *Dughi* v. *Harkins* (*2 L. D., 771*), it was held that 'the proof of the mineral character of the land must be specific and based upon actual production of mineral, and must show that the mineral value of the land is greater than its agricultural value.' Similar views were expressed in the case of *Samuel W. Spong* (5 *L. D.*, 193), which was the case in which the Acts of July 1st, 1862, and July 2nd, 1864, were construed. In *Cleghorn* v. *Bird* (4 *L. D.*, 478), and in *Commissioners of Kings County* v. *Alexander* (5 *L. D.*, 126), the decision in the case of *Dughi* v. *Harkins* is referred to with approval and followed. Rulings to the same effect upon applications for mineral patents are found in the decisions of the department for many years. * * *

In *Colorado Coal & Iron Co.* v. *United States* (123 *U. S.*, 307, 328), a bill was filed to set aside patents issued for agricultural lands on the ground that it was known at the time of their issue that the land contained mines of coal. The court said: 'To constitute the exception contemplated by the pre-emption act

under the head of 'known mines,' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are certain indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual "known mines," capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them under the pre-emption act cannot be successfully assailed."

While there is a slight difference between the phraseology of the definition given by the Assistant Attorney-General in his brief and that which he has advised the interior department to adopt, and which was adopted in said Berry case, the result is the same. Apply said definition to the case at bar; the Assistant Attorney-General says, "We characterize lands by those "qualities which predominate." The land involved in this controversy was surveyed in 1868, and returned by the surveyor as agricultural land; such returns are public records, and have uniformly been construed as *prima facie* evidence of the quality or character of land. At that date

the land was not known to contain mineral ; the agricultural and not the mineral quality predominated, and such was the character and condition thereof at the date defendant in error filed its map of definite route ; at the date of the construction and acceptance of its road, the ordering of the issuance of patents, and the certification of the land.

The Assistant Attorney-General says that in order to characterize land as mineral, not only must the mineral quality predominate, but the land must also have a special value on account of the mineral it contains. It cannot have a special value on account of its minerals unless they are known, or believed, from surface or other indications, to exist.

It appears, therefore, from the definition of "mineral lands," as adopted by the interior department and by Assistant Attorney Ceneral Shields, and as contended for by defendant in error in this case, that in order for lands to be classed as "mineral," the mineral character must not only predominate, but the land must have a greater value on account of such predominating character, namely, its mineral character, than on account of any other quality. It follows from all said definitions that the mineral quality of the land must be known to exist.

The definition offered by Toole and Wallace

is the one given by Judge Knowles in his dissenting opinion in the court below in this case. Their contention is that all lands are mineral which have a market value for the minerals they contain, notwithstanding the agricultural quality or character of the land may predominate over the mineral; the mineral character of the land, however, under this definition must be known. Lands cannot have a market value for a quality they are not known, or believed from surface or other indications, to possess.

The definition offered by Messrs. Dixon and Morris, to wit: that "Mineral land is such as "indicates the existence of mineral concealed "within its interior," contains but one element of a correct definition, namely: that the existence of mineral must be known or apparent, as maintained by every court and every administrative officer passing upon this question. Their contention is that if, from surface indications or otherwise, there is any evidence of mineral in land, no matter how valueless, and regardless of the extent to which the agricultural character predominates over the mineral, it is "mineral "land" as the term is used in the land legislation of this country.

A review of the land legislation establishes conclusively that congress intended, in the disposition of public lands of the United States, to de-

vote and appropriate lands to that purpose for which they are best suited. Congress certainly did not intend to prevent the acquisition under the agricultural land laws of the best agricultural lands simply because they contained minerals in valueless quantities.

The definition offered by Senator Sanders and the Attorney General, that lands which contain mineral in quantity sufficient to pay for their exploitation, whether known or unknown, discovered or undiscoverable, are "mineral lands," contains no element of a correct definition. Under this definition, land is mineral notwithstanding the agricultural character predominates; and notwithstanding there are no surface or other indication of the minerals it contains.

In disposing of the public lands of the United States, the unknown quality of land has never been a factor; the known or apparent quality has always been the guide of departmental and administrative officers of the government. Such, in the very nature of things, must govern in the future. Certainty and security of titles is the underlying principle of all the land legislation of congress; in construing any statute for the disposition of public lands this well-settled principle must be kept in view; the man who takes any other view must have great courage and no regard for the consequences or fitness of

things. In every grant of lands made by congress to states for schools, internal improvement or other purposes, and to railroads to aid in the construction thereof, the granting act has fixed a time for the attaching and adjustment of the grant. In all *in praesenti* grants of lands in place, if the grant is to a state of sections 16 and 36, the grant attaches at the date thereof, if the land is surveyed, otherwise at the date of survey; and if to a railroad company, at the date of filing the map of definite route of the road. In each case the states' or the companies' right to select indemnity or lieu lands vests at the date the grant attaches to the specific sections; and a state or company at said date is entitled to have its grant adjusted; in adjusting the grant and ascertaining the condition of the place land, all inquiries must relate to the conditions known or believed to exist when the right to the adjustment vested in the state or the company.

The definition offered by Senator Sanders and the Attorney General of the words "mineral lands" is based entirely upon the technical force of the phraseology used; they assume that lands which contain minerals can have no other quality or character, and cannot be disposed of under any land laws other than mineral. Senator Sanders, after giving said definition, further says:

"If, one thousand years hence, a mine is discovered in an odd section of land, which it will pay to work, thereby it will be demonstrated that on July 2d, 1864, congress had that particular land in view when it said, 'we except that mineral land out of the grant,' and that it not only then becomes but it is thereby demonstrated that it has always been during the thousand years the property of the United States."

21 Cong. Rec., 10946.
Rec. this case, 16.

The Attorney General, in his brief filed in this case, in emphasizing Senator Sanders' definition, says: "The simple truth is that under this "grant as well as under town site or other grants "mineral lands do not and cannot pass at all; con- "cede that the lands are mineral and they are "taken out of the grant and are still in the gov- "ernment." The Attorney General and Senator Sanders each concede that the same construction must be given to the provisions excepting "mineral lands" from railroad, town site, and all other grants. They are forced to this concession by the long unbroken line of decisions and departmental rulings construing such grants, cited in our original brief, pages 9 to 61 and 102 to 107 inclusive.

The enabling acts of Montana, North and South Dakota, Washington, Idaho and Wyoming each contain a provision reading as follows:

" All mineral lands shall be exempted from the " grants by this act." In said enabling acts grants of land are made to the states for public buildings and other purposes, and also a grant of sections 16 and 36 for school purposes. The grants of said sections 16 and 36 are *in praesenti* and attach to the specific sections at the date of the grant if surveyed, otherwise at the date of survey. It is conceded by counsel, as shown by the quotation from page 6 of the Attorney General's brief, that the same construction must be placed upon the exceptive provisions in the grant to defendant in error and in said enabling acts. It appears, therefore, from their contention that the grants of school and other lands to the states can never be adjusted; if, as counsel say, a thousand years hence mineral lands should be discovered within the said granted lands, it will thereby demonstrate that said lands have been, during said thousand, years the property of the United States. During said thousand years the predominating and only quality said land would be known to have would be agricultural; during said thousand years, in all controversies concerning said land, it would necessarily be conceded that it passed under the grant to the state for school purposes, or to the railroad company for its use and benefit; during all of said time, notwithstanding the land would

be the public land of the United States, it would be subject to taxation for the reason that it could not be proven that the land contained mineral. At the end of the thousand years, when it would be ascertained for the first time, perhaps under some new process of mining or of ascertaining the existence of precious metals, that the land was then and had been during said time the public property of the United States, it would then for the first time be demonstrated, or perhaps capable of demonstration, that all the assessments for taxes during said thousand years were wrongful. During that time the lands would undoubtedly have changed hands several times; valuable improvements would have been placed thereon, all of which would be taken without compensation by the fortunate discoverer of the mineral quality of the land. During said thousand years the public lands of the United States will all have been disposed of under the various land laws, and there will be no lands left from which to select indemnity to fill the grants.

Mineral lands are excepted from the donation act of 1850, applicable to Oregon, Washington and part of Idaho. Under said donation act 640 acres, if the claimant was a married man, and 320 if a single man, were donated by congress to the pioneers of that country in partial recogni-

tion of and compensation for the hardships encountered in their pioneer life. It is shown by the public records that Portland, Tacoma Seattle, Olympia, Port Townsend and other cities are located upon donation claims. It is now a well-known fact that most of that country is underlaid with coal, iron and other minerals. At the date of said donation act and the settlement of the pioneers upon their claims, the lands were not known to contain said minerals. If the doctrine contended for by the Attorney General and Senator Sanders is to obtain, the larger part of all the land taken under said donation act, much of which has already been patented, is public land of the United States, subject to be taken under the coal and other land laws on account of the minerals it contains.

In 1853, congress authorized the sale of all lands west of the Cascade mountains at public sale, excepting "mineral lands" from the operation of the act; a large part of said lands were sold under said act. The fact that the lands contained minerals was not then known. Is it possible that congress intended by said exception to leave open forever the question as to whether or not said lands are public or private property. Such a construction would be disastrous to the country; it would prevent the settlement and sale of agricultural lands; it would create such an inse-

curity and uncertainty in titles as would be ruinous to the commercial and material interests of all parts of the United States. The construction contended for is utopian; it is inconsistent with the history of land legislation, the decisions of every court and administrative officer passing upon the question, with one exception, and with the settled national and state policy to so legislate as to secure certainty in land titles.

If the position contended for by plaintiffs in error is the correct one, and all lands containing mineral without surface or other indications thereof are excepted from grants, such lands, until the discovery of such mineral, and until they are disposed of under the mineral land laws, are public lands of the United States; during the next thousand years mentioned in the argument of Senator Sanders and the Attorney General, all the school lands in Montana, North and South Dakata, Idaho, Washington, Wyoming, Colorado and other western states will be subject to exploration for mines, and this regardless of the other uses to which they are applied or the improvements placed thereon

This court in *Davis v. Wiebbold, 139 U. S. 525,* said:

"If their title would not protect them against a discovery of mines in them, neither would it protect them against an invasion of their property for the purpose of exploring for mines."

What would the title of the states and the railroad companies in their granted lands be worth with the right of invasion thereof existing to all the world? A mere statement of this proposition shows the unsoundness of the positions contended for by plaintiffs in error.

We submit this branch of the argument with confidence that the court will define "mineral lands" as lands in which the mineral character predominates over the agricultural, and such as have a greater market value for the minerals they contain than for agricultural or other purposes.

Positions taken by Counsel for Plaintiffs in Error.

The entire argument as contained in the 345 pages of briefs filed in this case by counsel for plaintiffs in error is founded upon the following contentions;

(*a*) *While admitting that the grant to defendant in error is in praesenti, and a title attaches to the land at the date of filing the map of definite route, counsel contend that a legal title upon which an action of ejectment can be maintained does not attach to the specific sections at said time.*

This question is too well settled to admit of

discussion. In *Smelting Co. v. Kemp*, 104 *U. S.*, 636; *Wright v. Roseberry*, 121 *U. S.*, 488; *Dolan v. Carr*, 125 *U. S.*, 618; *Butts v. Northern Pacific*, 119 *U. S.*, 55; *Deseret Salt Co, v. Tarpey*, 142 *U. S.*, 241, this court held that the title which attaches to the specific sections at the date of filing the map of definite route is a legal title upon which an action of ejectment can be maintained. In said *Deseret Salt Co.* case this court said:

"The grant was therefore in the nature of a float, but when the route of road was definitely fixed the sections granted became *susceptible of identification and the title then attached as of the date of the grant.* * * * A *legal* title as to the sections designated as distinguished from a merely equitable or inchoate interest passed to the railroad company by the act of congress upon the definite line of the road being once established by which the sections could be *ascertained* and *identified.*"

This question is regarded as well settled law in the state of Montana. In *N. P. R. R. Co. v. Majors*, 2 *Pac. Rep.*, 322, and *N. P. R. R. Co. v. Lily*, 9 *Pac. Rep.*, 116, the supreme court of said state said:

"A grant of lands by the Government is "higher evidence of title than a patent * * * "and will support ejectment."

The United States circuit court of appeals

for the 9th circuit, which includes Montana, in *N. P. R. R. Co. v. Amacker*, 1 *C. C. A.*, 349, 353, says:

"The title of the company to lands within the primary limits attached to the specific odd numbered sections as soon as they were *capable* of *identification* by the fixing of the *definite line* of the road opposite them, and the filing of a plat thereof in the office of the Commissioner of the general land office. * * * In the case at bar two of the defendants are in possession of certain subdivisions of the tract in dispute. As against them, upon the facts stated, *a suit in ejectment will afford a plain, adequate and complete remedy.*"

(*b.*) *Counsel for plaintiffs in error, notwithstanding they admit that the grant to defendant in error is in praesenti, and notwithstanding the unbroken line of decisions of this and all other courts passing upon the question, that a legal title upon which an action of ejectment can be maintained attaches to the specific sections at the date of filing a map of definite route, contend that the grant continues to be afloat until the issuance of patents.*

This contention is clearly shown by a reference to the assignments of error on page 5 and the conclusions on pages 17 and 18 of the brief of Messrs. Dixon & Morris. On page 17 of said brief they say:

"The act of congress, July 2d, 1864, did not

contemplate that the grant then made should attach to any definite or specific parcel of land until the issue of patent therefor to the company, and until the issue of such patent the grant remained floating and indefinite."

A similar position is taken by all counsel appearing for plaintiffs in error.

Since the decision in *Schulenberg v. Harriman*, 21 *Wall*, 44, made eighteen years ago, only three persons, to wit, Secretary Noble, Judge Knowles and a judge of an inferior court of Wisconsin have taken the positions here contended for. In *Wisconsin Central Railroad Co. v. Price County*, the Wisconsin court said :

" 4.—That on the 25th day of February, 1884, the plaintiff received a patent from the State for all said lands, and thereby acquired the absolute title in fee to the same ; that until then the plaintiff could get no title to the lands and had no right to sell or convey the same ; *that until they were segregated and identified* and the grant applied thereto, the grant was 'a float.'

"5. —That the plaintiff's right to the lands was in dispute between the State and the United States; that said lands and others were withheld from the State, and the plaintiff, by the Secretary of the interior, and thereby the issue of patents therefor by the United States was delayed."

Conclusions of Law :

" 1.—That it was not the intent and meaning of the act of congress that said lands should be

subject to taxation until they had been earned by the plaintiff and patented by the United States; that while they had been in truth earned by the plaintiff before they were assessed for taxation, yet the plaintiff's right to the same and to patents therefor had been denied by the Secretary of the interior; that the plaintiff could not exercise control over them until it should be determined whether it was entitled to receive patents for them as part of the lands granted.

"2.—That the lands were 'a float' as long as the plaintiff's right thereto was not admitted and recognized by the Secretary of the interior but denied and disputed by him, and patents therefor withheld by him against the will and request of the plaintiff, and hence during such time the lands were not subject to taxation by the State."

133 U. S. 502 and 503.

This language was used in passing upon an *in præsenti* land grant made at the first session of the 38th congress. The grant itself did not contain a provision excepting mineral lands therefrom. At the second session of said congress, January 30, 1865, 13 Stat., 567, a joint resolution was passed providing that mineral lands should be excepted from all grants made during the previous session of said congress; this exception applied to the Wisconsin grant in question.

Wisconsin was early recognized as one of the mineral land states; a large portion of the lands

therein contain copper and iron. At the date of the controversy in said Price County case the grantee's map of definite route had been filed and its railroad constructed, but the land had not been patented, and the Secretary of the interior denied that the company had any title thereto, or that the same inured to it under its grant. In 1883 the lands were assessed for taxation, and the railroad company filed a bill to enjoin the collection of the taxes, averring as a reason therefor, among other things, that the land had not been identified by the interior department, and that the Secretary claimed that the railroad company was not entitled thereto, and that no patent had been issued; said court, upon the hearing of the cause, made the findings of fact and conclusions of law hereinbefore mentioned. That court held, as contended by plaintiffs in error here, that until the issuance of patent the grant was a float, public property of the United States and not subject to taxation as private property of the railroad company. The supreme court of Wisconsin reversed said decision and this court affirmed the decision of said supreme court as to place lands and reversed it as to indemnity lands. In passing upon said case this court, among other things, said:

"But when the route of road was definitely fixed the sections granted became *susceptible of*

identification and the title attached to them, and took effect as of the date of the grant, so as to cut off all intervening claims; * * * it had then to the eleven forty acre parcels, which were *capable of identification, an indefeasible right or title;* it matters not which term is used."

Id. 509, 510.

The position of counsel for plaintiffs in error is that no power except the interior department can identify the lands; this court held in said *Price County* case that the tax commissioner could identify them. The court also held that the grant ceased to be a float at the date of filing the map of definite route.

Judge Knowles' views upon this question were evidently broadened by a discussion of the taxable character of defendant in error's grant, after the filing of the map of definite route, and before the issuance of patent, and, notwithstanding he had said, in his dissenting opinion in this case, that the grant was a float until the issuing of patents, in the case of *N. P. R. R. Co. v. Wright*, 51 *F. R.*, 70, he said:

"I think it may be asserted safely, that under these recent decisions, the plaintiff received a present *legal title to the land embraced in this grant*, and that said lands became *identified* when the definite route of plaintiff's road was definitely fixed and a plat thereof filed in the office of the Commissioner of the general land

office; that is, they were *capable* of being *identified by evidence.*"

In said case the learned Judge held that the tax commissioner and the courts could identify the lands; and that the grant, at the date of filing said map, ceased to be a float.

The same conclusion was reached by circuit Judge Caldwell and district Judge Thomas in *N. P. R. R. Co. v. Walker*, 47 *F. R.* 682, 3–4. In said case, the court not only held that the grant to the defendant in error was *in praesenti*, and that a legal title attached to the specific sections at the date of filing the map of definite route, but that the predominating character of the land as then known to exist disposed of the question as to whether or not it passed under the grant.

After deciding that the determination of the mineral character of lands could not be left to the accident of future ages, the court said of lands to which no patent had been issued to the grantee:

"The absolute title to the lands has, therefore, vested in the company, The discovery of mineral in any of these lands in the future will not redound to the prejudice of the company, but to its profit, for it will own the mineral as well as the land."

Circuit Judge Sawyer and district Judge Sabine, in the case of *Franckoeur v. Newhouse*, 40

F. R., 618, decided every question involved in this controversy. They held that the grant to the Central Pacific railroad company was a grant *in praesenti*; that a legal title attached to the specific sections of the date of the filing the map of definite route; that at that date the grant ceased to be a float, and that an erroneous decision of the Secretary of the interior as to the meaning of "mineral lands" could not divest the right which had already vested in the grantee, and that the discovery of the mineral quality of the land after the filing of the map of definite route was immaterial, and did not divest the title which had already vested.

Judges Sawyer and Sabine have had great experience in disposing of questions relating to public lands, including mineral lands, and their decisions upon such questions are entitled to great consideration.

The propositions which we are contending for, and which were announcedby this court in *Davis v. Wiebbold*, and by Judges Swayer, Sabine, Caldwell, Thomas, and others, in the decisions above referred to, were the law of the interior department prior to August 30 1890. In *Nelson v. N. P. R. R. Co.*, 9 *L. D.*, 402, Secretary Noble said:

"The status of the land at the date of definite location determines whether it will pass under the grant. * * *

The rights of the road are determined by the status of the land at the point of time when the grant attaches."

In *N. P. R. R. Co. v. TeQuda*, 11 *L. D.*, 304, Secretary Noble also said: "The company's "rights finally attach on definite location." On August 30, 1890, Secretary Noble reversed the rulings of his predecessors and himself, and swept away the decisions of this court and of the supreme courts of California, Nevada and Oregon, and of the circuit and district courts of the United States for the eighth and ninth circuits, as if they were cobwebs, and announced three new heresies, to wit:

1. That a legal title did not attach to specific sections at the date of filing the map of definite route.

2. That the grant continued to be a float until the issuance of patents.

3. That the decision of an administrative officer, misconstruing the law, was final and binding upon the parties and the courts.

We have shown, conclusively as we think, that the first two of these propositions are not sustained nor sustainable, by adjudications or upon principle. In examining the third proposition, namely, the binding force of a mistake of law by an administrative officer, it is desirable to note

the circumstances under which the question arises in this case. There is no controversy about facts here; they are conceded and settled, the question for consideration is purely and technically one of law; the land at the date of the grant and the filing of the map of definite route was agricultural; its agricultural quality predominated; no other quality was known to exist; none other existed in the sense in which the language is used in the every-day affairs of life or the administration of justice. A fact which cannot be proven does not exist in law. The sum of the Secretary's contention is that the title to lands granted does not pass by the grant, but that it is conveyed by the patent.

Senator Sanders in his argument says:

"The patent and the law harmonize; the one is the shadow or the complement of the other; the law gives the title, the patent makes a record of what the law has done and is impotent to change by a hair's breadth that which the law of congress has willed."

Brief of Attorney General, page 58.

The law as announced by Senator Sanders upon this question is sustained by principle and by the decisions of every court passing thereon.

Wright v. Rosebery, 121 *U. S.*, 488.
Dolan v. Carr, 125 *U. S.*, 618.

This court in the case of *St. P. & P. R. R. Co.* v. *N. P. R. R. Co.*, *139 U. S.*, 1, held that no title whatever passed by the patent to the railroad company; nothing was added by the patent to the title; the patent was another and convenient evidence of the title which had already vested; and in that case you also said "that these questions were too well settled to admit of further discussion."

In *Knight* v. *United States Land Association*, *142 U. S.*, *212*, this court said:

> "That the United States cannot convey by patent what it has already parted with, no matter with what formality the instrument is issued, is a self-evident proposition; the government in that respect is under the same limitation as an individual."

The doctrine that the title passes by the grant and not the patent, and that an administrative officer without judicial power cannot by his decisions affect vested rights in property, is not a new one in the interior department. In *Randolph* v. *N. P. R. R. Co.*, *9 L. D.*, *416-19*, passing upon a case where a regular notice as required by law had been pubished and the railroad company had failed to appear before the Register and Receiver and the Commissioner of the general land office, and was in default, the Secretary said:

"Upon such a record there could be no question that the company's right attached to the tract in question at the date of definite location, and the absence of the company from the hearing on Randolph's final proof in no way alters the case made or its legal consequences."

The Secretary in *N. P. R. R. Co.* v. *Harris*, *12 L. D., 351, 354*, said:

"The case under consideration is very similar to that of Randolph, and under the ruling of the department in the Randolph case, the right of the Railroad Company to the land in question is superior to that of Harris, and, being a '*vested right*,' the land inured to the company notwithstanding its failure to appear and contest the claim of Harris."

In each of said cases nothing appeared in the records of the land office, so far as the land was concerned, except the grant to the company, the filing of its maps of general and definite route, the survey of the land, and the return of the same as agricultural by the surveyor. Upon such facts the Secretary adopted the rule which had been announced by all his predecessors passing upon the question, and by all the courts considering it, that a legal title vested in the company and attached to the land at the date of filing the map of definite route, and that he was powerless to divest that vested right.

The supreme court of California in *Megerle* v.

Ashe, 33 Cal., 89–90, in discussing the jurisdiction of the interior department over lands the title to which had passed out of the government, said :

" It would, in substance, be a litigation of the title between the United States government and Terry claiming under a grant already made, on an application by Megerle to the government for a purchase of the land. No such jurisdiction is conferred on officers of the land department. For the purposes of the contest, the land department and the Secretary of the interior necessarily assumed, as the foundation of their jurisdiction, that the United States government owned the land, and that it was open to preemption by somebody—the very point now in contest; and assuming this point, the jurisdiction extended to a determination, as between the government and the contestants, of the rights of parties seeking to purchase. Terry did not occupy the position of such a party, and he was not seeking to purchase of the United States. He claimed that he had already acquired a right under a grant made to California, and that the grant had attached to the specific tract and the title had actually vested in the state, by virtue of his location ; and those tribunals had no jurisdiction to finally adjudicate his rights. Their determination, therefore, did not conclude him. It follows that the record of the proceedings before the various officers of the land department in the contest between Terry and Megerle was not admissible in evidence as matter of estoppel against Terry, by showing that the matter had already been adjudged ; nor for the purpose of proving, as against Terry, the truth of the matters recited in the various opinions and documents."

This court in *Hardin vs. Jordan, 140 U. S., 400–401*, said:

"A question is made with regard to the effect of the proceedings which took place before the Register and Receiver of the local land office, and, by appeal, before the Commissioner of the general land office and the Secretary of the interior, in relation to the right of the government to survey and grant the lands under Wolf Lake in 1874. Both Hardin and DeWitt were notified of said proceedings and appeared and contested the same; but the decision was against them and in favor of the government. It is contended that by this decision the question became *res judicatæ*, and that Hardin and DeWitt and those claiming under them are bound thereby. It is very true that the decisions of the land department on matters of fact within their jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of *Davis v. Weibbold, 139 U. S., 507*, decided at the present term of this court, 'if the lands patented were not at the time public property, *having been previously disposed of*, or no provision had been made for their sale or other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.' So that, if the lands had been previously disposed of, the department had no jurisdiction over them; and the question whether *they have, or have not, been previously disposed of is a judicial question, and not determinable by the executive department, except for the purpose of governing its own conduct in the administration of its functions.*"

The authorities all hold that, where the land has been granted, or the title passed out of the government, the interior department has no jurisdiction over it, except for the ministerial purpose of issuing the patent. Notwithstanding these decisions, August 30, 1890, the Secretary decided the case of *Cen. Pac. R. R. Co. v. Vallentine, 11 L. D. 238*, in which he announced the three heresies hereinbefore referred to, and the doctrine for which the plaintiffs in error are contending in this case. Counsel for plaintiffs in error in their briefs say that the doctrine there announced for the first time is of twenty years standing in the department, and has been recognized during all that time as a rule of construction. This is a mistake. The map of definite route of the Northern Pacific Railroad was filed through the mineral states of Montana and Idaho in 1882, and the first case in which any department passed upon this question, so far as the Northern Pacific Company is concerned, is reported in *13 L. D. 691*, decided in Dec. 1891; and the first case in which the question was ever passed upon by the department is the Vallentine case above referred to. The doctrines therein announced are not old; on the contrary they are quite new; they are strangers in the administration of public land laws, and we submit that we have shown that they are not well grounded in

principle or sustained by a single judicial decision, or by any ruling of a departmental or executive officer, except in the Vallentine case and the two or three cases decided by the same officer within the last two years.

In the enabling act of Colorado, sections 16 and 36 are granted to the state for school purposes in the usual terms. The enabling act contains a provision excepting "mineral lands" from the operation thereof in language as broad and comprehensive as that found in the charter of the Northern Pacific Company. This is conceded. Asst. Atty. Gen. Shields holds that it is the predominating character of the land at the date of the passage of the act, or the survey, which determines whether or not the land passes to the state or remains public property of the United States. He says, however, that the rulings upon the Colorado school land question have no bearing upon the construction of similar language in railroad grants for the reason that grants to the states, as he contends, for the building of railroads, canals and other internal improvements, and to the states for school and other purposes are to be construed liberally, while grants to railroads are to be construed strictly. This is another mistake of law. The Attorney General says that "all such grants are "to be construed alike;" this has been the es-

tablished law of the interior department since 1872. During said year the Secretary of the interior said :

"All grants made by the government to individuals, corporations or *states* are to be construed strictly against the grantee; nothing passes by implication ; the intent of the lawmaker governs."

Copp's U. S. Mining Decision, 111.
Dubuque & P. R. Co. v. *Litchfield, 23 How., 66.*
Leavenworth L. & G. R. Co. v. *U. S., 92 U. S., 733.*
Union Pac. R. Co. v. *U. S., 99 U. S.,* 402.

Judge Brewer, in construing the charter of the Northern Pacific Railroad Company in the case of *N. P. R. R. Co.* v. *St. P. & P. R. R. C.o, 26 F. R., 558,* said :

"Counsel's argument rests on the technical force of the phraseology, while I understand the supreme court to base the rule on the presumed attitude of congress towards such public improvements. While the grant is vast, the line to be constructed in order to earn it is continental ; the grant was made because congress believed the public good required the road, and in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, *it is fairer to presume that congress intended the freest bounty rather than to believe that it bur-*

dened the grant with extra exceptions, which when construction became feasible might largely deplete it of value."

The decision announced by Judge Brewer in said case was affirmed by this court, and the principles announced therein, and the reasons upon which the judgment is based, are now well settled law.

This court, in the case of *Leavenworth, &c., R. Co. v, U. S.*, 92 *U. S.*, 733, concerning the rule of construction applicable to railroad land grants, said :

"They apply as well to grants of lands to states to aid in the building of railroads as to grants of special privileges to private corporations : in both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object, the accomplishment of which it desires to promote but declines to undertake,"

See, also, *Rice v. Railroad Co.*, 1 *Black*, 360.

See, also, *C. St. P. M. & O. Ry. Co.*, 9 *L. D.*, 483, 487.

The proposition that it is the intent of congress that all land grants for public or *quasi* public purposes are to be construed alike, is conclusively shown by the joint resolution approved January 30, 1865, 13 *Stat.*, 567. During the first session of the 38th congress that body

made the usual grants to the states of Nebraska, Nevada and other states, for purposes of internal improvement, and of sections 16 and 36 for school purposes; it also granted lands to Wisconsin and other states for railroad purposes; it also extended the time for accepting grants previously made, without expressly excepting mineral lands from said grants. In said resolution, congress declared that "no act passed by "the first session of the 38th congress granting "lands to states or corporations to aid in the "construction of railroads, or for other pur- "poses,or to extend the time of grants hereto- "fore made, shall be so construed as to embrace "mineral lands." This resolution covered the grant of lands made to Wisconsin for railroad purposes, construed by this court in *Wis. Cen. R. R. Co. v. Price Co., supra.* As we have already shown, the interior department, at a very early date, held that it applied to land grants made to states for school and other purposes.

Copp U. S. Min. Decision, 30.

It is not possible that congress intended that one class of land containing minerals should be excepted from the school and other state grants made at the first session of the 38th congress, and that another class should be excepted from all other grants made at the same session. The

history and language of the resolution clearly demonstrate that whatever was to be regarded as mineral land in one case should be regarded as mineral land in all cases; therefore we conclude the words "mineral lands," as used in the charter of the Northern Pacific Company, are entitled to and must receive the same construction and definition that the same words have received in the enabling act of Colorado, the joint resolution of 1865, and other land legislation.

This disposes of the three heresies constituting the foundation and basis of the decision in the Vallantine and other like cases following it.

(*c.*) *It is contended by counsel for plaintiffs in error, and the contention is well grounded, that there is no philosophical or logical reason why one rule should be applied to railroad grants and another to the acquisition of lands under the pre-emption, homestead, town site and other land laws.*

We agree with them fully in this contention; all the canons of construction, and the rules applicable to the administration of the public land laws of the country, as recognized from our earliest history to the present time, demand and justify this conclusion. Counsel for plaintiffs in error say:

"The true philosophical and logical reason why, in town site and other ordinary cases, the character of the land as mineral, agricultural, etc., is held to be fixed at the date of the patent, is because the patent is the voluntary act of the executive department, after full examination, or an opportunity for an examination, and is held to conclude the government by its own voluntary act."

Brief Attorney General, 5.

It is not the date of the patent in any case which we look to in the determination of the predominating quality of land. It is the date of the sale, the entry, the grant, or when the grant attached, in all cases. Here is some evidence that counsel for plaintiffs in error have only read one decision construing grants by congress to railroad companies or states during the last eighteen years, and that is the decision affecting the school grant to the State of Colorado, decided in 1888, reported in 7 L. D., 490. In that decision the Secretary of the interior reversed a large number of previous decisions by himself and his predecessors without any reference to them. The Colorado case, however, was reversed in the *Miner* case, reported in 9 *L. D.*, 408. The reasons given in said Miner case for the reversal of the Colorado case are sound, logical and unanswerable, and it is now the well established law of the courts and the interior department that it is not the date of the patent, as

counsel assume, but the date of the sale, entry or attaching of the grant which we look to in determining whether or not the land passes under the grant. It is the predominating character of the land at that date and not at any subsequent time which settles the entire question; and in the very nature of things this must be so; patents are not issued for months, and in many cases for years after the right to them has vested in the grantees; there is never any evidence received as to the rights of the parties or the character of the land at the date of issuing the patent; the case, as made at the date of sale, entry, or filing of the map of definite route, determines the entire question. When the right to the patent vests, it is deemed in law issued, and when issued, it in fact relates back to the date of the grant, entry or sale.

See Original Brief 56.

Most of the questions involved in this case are decided by the interior department in a school land case, 9 *L. D.*, 408, 412. In said case the department says:

"The decisive question in all these cases is, has the title vested? If it has, not only the policy of the government as indicated by congressional legislation, but also the wholesome spirit pervading the common law in favor of the quieting of titles steps in and forbids the setting aside of such title, because of facts subsequently

developed and which were unknown when the title passed. It is better that the lesser evil of lands, in fact mineral, being acquired by a mode different from that prescribed by law for the acquisition of lands known to be mineral, should be submitted to, than that the title to the state should in cases of subsequent discovery of mineral be divested, thus unsettling all titles to school lands, both to and from the state, lessening the value of such lands in the hands of the state and its grantees in all cases, and in some cases depriving innocent purchasers of their vested rights"

These principles and reasons apply with great force and vigor to railroad grants.

It seems that the Secretary has about concluded to abandon the position taken by him in the Vallentine case, to wit: that it is the condition of the land at the date of the issuance of the patent which must be looked to in determining whether or not land passes under the grant, for on July 18, 1892, in *Leonard v. N. P. R. R. Co.*, 15 *L. D.*, 71, he said:

"In determining this question we must look "to the condition of the land at date of definite "location of the road."

(*d.*) *Counsel for plaintiffs in error contend that the word "excluded," as used in defendant's original charter, is broader than the word "excepted," as used in the same connection in the joint resolution of May 31st, 1870, enlarging and extending defendant in error's grant.*

The language used in said resolution is, "*ex-*
"*cept* mineral and other lands as *excepted* in the
"charter of said company." Said joint resolution is a legislative interpretation that the word "excluded" as used in the original charter, and "excepted" as used in said joint resolution, are synonymous. This position of counsel for plaintiffs in error is so devoid of merit that we must decline to discuss it further.

(*e.*) *Messrs. Dixon & Morris further contend that the word "mine," as used in the land legislation of the country, includes only such mines as were open, developed and worked.*

Webster's dictionary defines "mine" as follows:

"2. A rich source of wealth or some other good."

Bouvier's in his law dictionary, vol. 2, page 165 gives the following definition of "mine."

"1. An excavation made for obtaining minerals from the bowels of the earth; and the minerals themselves are known by the name of mine.

"2. Mines are therefore considered as open and not opened. An open mine is one on which work has been done and part of the materials taken out."

These definitions are entirely consistent with the use of the word by congress in land legisla-

tion. The act of March 3, 1807, 2 stat. 448, contains the following language: "and any grant "which may hereafter be made of a tract of "land containing a lead mine, which has been "discovered previous to the purchase of such "tract from the United States, shall be consid- "ered fraudulent and null." It is apparent from this language that lead mines, other than those which have been discovered previous to the purchase, might exist in the land.

Our position upon this question is made very clear by a reference to the preemption act of 1841. The language there used is "known "mines or salines." The rules of statutory construction require that a statute shall be so construed as to make every word thereof operative and serve a purpose; it follows therefore that Congress in its legislation classifies "mines" as known and unknown.

The object of counsel in placing the restricted meaning upon the word "mine" is to destroy, if possible the effect of the decision of this court in *Davis v. Wiebbold, 139 U. S.*, 507, construing the townsite act. The language used in said act excepting minerals is, "no title shall be ac- "quired to any mine of gold, silver, cinnabar or "copper, or to any mining claim or possession "under existing laws." In construing said act this court said:

"The exceptions of mineral lands from pre-emption and settlement and from grants to states for universities and schools, and for the construction of public buildings, and in aid of railroad and other works of internal improvement, are held not to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify an expenditure for its extraction, and known to be so at the date of the grant."

This court in said case construed "mine" and "mineral lands" as being synonymous. Prior to 1847 the word "mine" was generally used in land legislation in reference to "mineral lands;" after that time, with a few exceptions, in the enactment of all original statutes congress has used the words "mineral lands" in lieu of "mines." This change is due largely to the constant use by the executive and administrative officers of the government, of the words "mineral lands," between the date of the preemption act of 1841 and the act of 1847, in which the words "mineral lands" are first used by congress.

We desire to call the court's attention to a few executive and departmental documents published between 1841 and 1847, in which the words "mineral lands" were used, prior to their adoption in the land legislation of the country, as synonymous with "mines."

March, 1842, the Secretary of war, who then

had control of the public mineral lands, in reference to the withdrawal of mineral lands under the act of 1807, said:

"But in order to carry into effect any such plan, the United States must first ascertain the mineral lands to be retained. * * * At this time at least one-third of all the mineral smelted in the country is taken from lands entered, in my opinion, according to law, there having been no mineral discovered previous to the entry. * * * These entries may be divided into three classes:

1.—Entries made of lands in which lead mines have been discovered only since the entry, and which, in my opinion, are valid."

Senate Pub. Doc., 205, *2nd Sess.*, *22nd Cong.*, *pages* 6 *and* 7.

In reserving "mineral lands" under the legislation at that time, or any legislation, only such lands were reserved as were known to, or apparently contained minerals in quantities sufficient to warrant the lands being classed as mineral instead of agricultural. Although the law in existence at the dates referred to in said public document prohibited the sale of lead mines, yet it was a known fact at that time, that many of such mines were sold and patented, and the Secretary concludes rightfully, notwithstanding they contained minerals in paying quantities.

The Secretary, February 19, 1842, in reference to "mineral lands," said:

"The President, by proclamations of May and July, 1834, reserved the 'mineral lands' in that district from sale. The government surveyors had marked on the plats 61 sections as containing lead mineral. They run only the exterior lines of the section. When one of those sections passed over 'diggings' they put the mark by which the existence of mineral was indicated on both sides of the line. Where the 'diggings' happened to be at the corner of the section, they placed the mark on that corner, and upon the three others, corners of which were contiguous to the 'diggings.' The indications so furnished by the surveyors were probably the evidence upon which the officers of a district supposed they were to act in ascertaining the 'mineral lands' to be reserved.

A very large proportion, doubtless, of that part of it which was not covered by the surveyor's indication of mineral has passed into the hands of individuals by fair and unimpeachable entries."

Ho. of Repre. Doc., No. 277, 27th Cong., 2nd Sess., pages 7 and 10.

January 13, 1844, the Secretary of war in a public document entitled "mineral lands of the upper Mississippi," said:

"We now come to the reservation in virtue of the orders of the President given through his official agents, who report the same to the Land Office (as did the United States lead agent to the Land Office of Wisconsin) in consequence of orders from the President. This officer reported many tracts in Wisconsin to be reserved as 'mineral land' in obedience to the orders of the

President—some of them, no doubt, having, and some not having mines; but all supposed to be 'mineral lands.' * * *

As, therefore, the reservations of all 'mineral lands' come within one or the other of these three cases, viz.: of mines previously existing; of indications of mines on plats of survey; or of orders of reservation, through the President's agent."

Ho. of Repre., Doc. No. 43, 1st Sess. 28th Cong., page 24.

It appears, therefore, from said report, that three classes are reserved under the act of congress requiring the reservation of all mines from sale, namely: 1. Known mines; 2. Indications of mines on the plats of survey; 3. Reservations made by the President on reports of the mining agent of the government. "Mines" and "mineral lands" were here construed to include known mines, and such lands as were believed to contain valuable mines, from surface or other indication."

See also pp. 38–9 Original Brief.

January 22, 1847, the senate committee made a report concerning "mines" and "mineral lands." The report is entitled "Lead Mines." The bill which the committee had been considering and upon which it made the report was entitled "A "Bill to direct the President of the United States "to sell the reserved mineral lands in the state

"of Illinois and the territories of Wisconsin and "Iowa, supposed to contain lead ore." Throughout the report the lead mines were referred to as "mineral lands." Upon this report the act of congress in which the words "mineral lands" were first used, viz: Act of March 7, 1847, 9 Stat. 146, was passed, and from that day to the present time the words "mineral lands" have been generally used by congress in excepting "mines" from public land grants, and used in the same sense that they were used by the Secretary of war in said reports; they include not only such lands as are known to contain valuable mines. but such as, from surface or other indications, were believed to contain valuable mines, and had a market value therefor greater than their agricultural value.

Messrs. Toole & Wallace, who are known to be great mining lawyers, do not agree with Messrs. Dixon & Morris as to the meaning of the word "mine." On page 108 of their brief they say:

"A conveyance of land carries all mines known or unknown. So the title to a piece of land is a title to all mines in it known or unknown."

Senator Sanders uses the word "mine" in the same sense.

Brief, Attorney General, p. 130.

But the word "mine" is not used in land legislation in this broad sense. The definitions, as sustained by decisions, judicial and departmental, is the one given by this court in *Davis v. Wiebbold.* The definition given in said case is adopted and applied by the interior department to railroad grants in the case of *Berry. et al. v. Central Pac. R. R.*, 15 *L. D.*, 463, decided November 19th, 1892, the interior department said:

"The surveyor general returned the land in section one as agricultural, and in *Tinkham* v. *McCaffrey*, (*13 L. D. 517*), it was held that 'a contestant who alleges the mineral character of land that is *prima facie* agricultural, must show affirmatively the existence of mineral in sufficient quantity to make the land more valuable for mining than agricultural purposes.' * * *

The United States circuit court for the district of Oregon, in the case of *U. S.* v. *Reed and ano.*, (*28 F. R., 482*), after an exhaustive discussion of a like question say (p. 487):

'The statute does not reserve any land from entry as a homestead, simply because some one is foolish or visionary enough to claim or work some portion of it as mineral ground, without any reference to the fact of whether there are paying mines on it or not. Nothing short of known mines on the land, capable, under ordinary circumstances, of being worked at a profit, as compared with any gain or benefit that may be derived therefrom when entered under the homestead law, is sufficient to prevent such entry.'

One of the latest expressions of the United States supreme court upon this question was in *Davis* v. *Wiebbold*, (*139 U. S. 507*). On page

519 it is expressly said that the exception of 'mineral lands' from grants in aid of railroads is 'not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction.' * * *

From all the facts and circumstances of the case, I concur in the conclusion reached by the Register and Receiver, that the land in question 'possesses a positive value for agricultural uses, and possesses little or no value for mineral purposes.' The decision appealed from is therefore reversed."

The interior department, therefore, in one of its latest cases upon the question, has held that the definition of "mineral lands," as given by this court in a case under the town site act, is applicable to railroad grants.

(*f.*) *Counsel for plaintiffs in error contend that it is the predominating character of land at the date of patent which determines whether or not a title vests in the grantee.*

If this contention is correct, the grant to defendant in error can never be adjusted.

The land involved in said Berry case was known to contain some mineral prior to the grant; a mine had been opened and worked thereon prior to that date; it was found, however, by the interior department, that the predominating character of the land was agricultural

and not mineral, and that the land possessed, at the date of the hearing, greater value for agricultural purposes than for mineral or other purposes. In said case the interior department did not consider the predominating or other character of the land at the date of filing the map of the definite route. The department also said that it was the predominating character of the land at the date of issuing the patent which finally determined whether or not it inured to the company under the grant. It follows therefrom that the decision made by the department, after a full and fair trial of said Berry case, is not final. It was found from the preponderance of evidence in that case that the predominating character of the land was agricultural at the date of the hearing; it is very probable, that before the patent shall have issued for said lands, other mines will be found therein, or a new process of extracting the ore will have been discovered by that time, so as to give the lands, at the date of another hearing, or the date of patent, a greater value for the minerals they then contain than for agricultural or other purposes.

The selection list of defendant in error covering the land involved in this controversy was filed in the local land office November 9, 1886, approved and certified by the Register and Receiver of said office December 9, 1886, and at

that time, the predominating character of said land was agricultural. Under improved processes of mining it was ascertained, in 1888, that it contained minerals which it would pay to work, and the predominating character of the land changed; many similar cases undoubtedly exist in the grant. Under the ruling of the Secretary of the interior, in said Berry case, that it is the predominating character of the land at the date of patent which determines whether or not it inures to the company under its grant, it is certain that land which was known to contain minerals at the date of the grant, filing the map of definite route and listing the lands as aforesaid, will not be mineral lands at the date of patent; they will have been worked out as were the lands involved in said Berry case; their predominating character at the date of the patent will be agricultural and not mineral. It will therefore appear conclusively that the company has included in its selection lists lands which it ought to exclude and has omitted lands which it ought to include; it follows therefore that the list will be cancelled by the Secretary for want of an accurate description of the lands inuring to the company under the grant, and the company will be required to prepare and secure the approval of a new list. It is a well-known fact that the preparation of

such lists requires time; that it also takes considerable time for the Register and Receiver to compare the same with the records and obtain the necessary knowledge warranting them in making the usual certification. It is also a well-known fact that it takes from 6 to 20 years to obtain patents after a list has been carefully examined, found accurate and certified by the Register and receiver of the local land office. Under the ruling of the interior department it is certain that, within the time necessary to the preparation of said additional list, the approval thereof by the Register and Receiver, and obtaining the patent thereon, the predominating character of many tracts of land described in the list will have changed, and that the second list, like the original one, will not accurately designate lands to which the company is entitled under its grant. If the rule of the decision laid down in said Berry and Vallentine cases, and as contended for by plaintiffs in error in this case, obtains. the officers of the railroad company will be required to dance attendance upon the local land offices and the interior department, in endeavoring to adjust railroad grants under this shuttlecock process, for the next thousand years without securing an adjustment. Certainly congress did not intend, in

excepting mineral lands from all grants, such absurd consequences.

Counsel for plaintiffs in error, as bearing very remotely upon this question, also contend that the interior department has required all railroad companies for twenty years last past, in listing their lands, to prove, at the time of listing, that the lands do not contain any minerals. This is also a mistake; from the date of the administration of the earliest grant down to the present time, but one form of proof and certification, prior to patent, has obtained. That form will be found in Lester on Land Laws, and in all the departmental books of form; that form was used in certifying the list including the land involved in this controversy; the lists are certified in duplicate originals, one of which is retained by the company, another is a matter of public record in the interior department. This court takes judicial notice of such records. We have, therefore, for the convenience of the court, obtained a copy of the proof attached to the list in this case and the certification by the Register and Receiver; said proof and certificate read as follows:

"STATE OF MINNESOTA, }
County of Ramsey, } ss.:

I, CHAS. B. LAMBORN, being duly sworn, depose and say: that I am the land commissioner of the Northern Pacific Railroad Company; that the foregoing lists of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said Northern Pacific Railroad Company as inuring to said company, to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route, for which a grant of lands was made by the act of congress approved July 2, 1864, and the joint resolution approved May 31, 1870; that the said lands are vacant, unappropriated, and are not interdicted mineral or reserve lands, and are of the character contemplated by the grant, being within the limits of 40 miles on each side of the line of route for a continuous distance of
miles, being a portion of the lands for a section of miles of said railroad commencing and ending .

CHAS. B. LAMBORN, [L. S.]

Sworn and subscribed before me this }
9th day of November, 1886. }

S. S. STARIN,
Notary Public,
Ramsey County,
Minn.

Notarial
Seal.

UNITED STATES LAND OFFICE,
HELENA, MONTANA,
December 9, 1886.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant to the said company, by act of congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Chas. B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further testify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of forty miles on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state, or any other valid claim to any portion of said lands on file or record in this office,

We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the act of congress approved July 2, 1864, and contemplated by the circular of instructions dated November 7, 1879, addressed by the Commissioner of the general land office to Register and Receiver of the United States land offices; and that the said company have paid to the undersigned, the Receiver, the full sum of fourteen thousand two hundred and eighty-eight dollars, in full payment and discharge of said fees.

$14,288. S. W. LANGHORNE, Register.
H. S. HOWELL, Receiver."

It appears from the affidavit attached to the list that the company is not required to prove that the lands do not contain minerals; it is required only to prove that lands are not "prohibited" or "interdicted mineral land" and "are of the character contemplated by "the grant." We construe the above language as requiring the company to prove that, so far as it is concerned, the lands were not known to contain minerals of value at the date the grant attached; no other lands containing mineral are "interdicted" or "prohibited." The accuracy of this position is clearly demonstrated by the certification of the Register and Receiver: They are not required to certify that the land does not contain mineral: They are only required to certify that the land is not returned or denominated as mineral by the surveyor.

In said proof the company averred that the land involved in this controversy inured to it under its grant; the Register and Receiver, upon whom devolved the duty of certifying the list, found that the contention of the company in this respect was true, and certified that said land inured to the company under its grant. Said proof and certification comply strictly with the law and rules and requirements of the interior department. It is now claimed, however, that they are imperfect and insufficient, not in con-

sequence of any known or provable fact existing at the date of said hearing, but in consequence of new discoveries since that date.

It appears from said certificate that the law, and the rules and regulations prescribed thereunder by the interior department, require the company to pay to the government certain fees before obtaining patents from the United States for granted lands. The amount of such fees due the United States on account of said lands described in said list amounted to $14,288, as shown by said receipt; this amount was, December 9, 1886, paid to the United States, and the Register and Receiver, as required by law and the instructions of the interior department, executed and delivered to the railroad company said receipt in full payment of said fees; said receipt is evidence of the company's title to the land involved in this controversy; it is entitled to the same weight as evidence in all controversies concerning the land included therein as the Receiver's receipt in preemption, homestead or other private land entries. The company's right to patent certainly vested at the date of the receipt of said money by the government, and the execution and delivery of said receipt. The Commissioner of the general land office and the Secretary of the interior, as they would each receive the said list and certificate, would probably have a right to test the

correctness of the same from the records and proofs then existing in the interior department, and if they found from said records and proofs that the Register and Receiver had erred in certifying said list, they could correct it to correspond with the record; they however would have no right to withhold the patent hoping that, in the future, something might turn up to show its inaccuracy; it goes without saying that said proof, receipt and settlement between the railroad company and the government cannot be cancelled and set aside on account of the changed predominating character of the land, as a consequence of new discoveries in the methods of mining, discoveries of new sources of water supply making mining possible, or a change in the condition of things from any other possible cause. If the interpretation of railroad grants contended for by plaintiffs in error in this case, and as announced by the interior department in said Berry and Vallentine cases, is to obtain, during the next thousand years railroad companies and the government will be required to make thousands of just such settlements and adjustments as the one referred to. The very object of the law and the circulars issued by the interior department requiring the proofs by the company and the certification by the register and receiver, hereinbefore mentioned, is that there

shall be a time fixed finally and definitely when all controversies concerning the right of the company to patents shall end. All the courts passing upon this question, and they are quite numerous, have held that a railroad company's right to a patent vested at the date when the President approved the report of the commissioners appointed to examine and accept the road; but for the purposes of this case we may concede that the right to the patent did not vest until the payment of the $14,288, hereinbefore mentioned, and the approval of the list and the execution and delivery to the company of said Register's and Receiver's receipt; no good reason can be assigned, however, why the right of the company to the patent, as further evidence of its title, did not vest at said date and preclude all further investigation or inquiry as to the predominating character of the land. An adjudication by this court that the right to the patent vested at said date must necessarily result in an affirmance of the judgment rendered in this case by the court below; we trust, however, that the court in its decision will reach the heart of this case and decide that a legal title attaches to the specific sections at the date of filing the map of definite route, so as to dispose of this question forever.

(*g.*) *Counsel for plaintiffs in error also contena that the averments in the complaint that the interior department has failed and refused to issue patents to the railroad company for the land involved in this controversy, is equivalent to an averment that the interior department has decided that the company is not entitled to such land, and that the case now stands as though a patent had been issued to the plaintiffs in error, which they claim is not subject to collateral attack in an action at law.*

The complaint is not susceptible of the construction contended for, but if it were it would not alter the law of the case. Justice Lamar, in delivering the opinion in *Knight* v. *United States Land Association*, 142 *U. S.*, 176, said:

"Ever since the decision in *Polk's Lessee* v. *Wendall*, 9 *Cranch*, 87, it has been the settled law of this court that a patent is void at law if the grantor state had no title to the premises embraced in it, and that the want of such title or authority can be shown in an action at law. *Patterson* v. *Winn*, 11 *Wheat*, 380, 384; *Stoddard* v. *Chambers*, 2 *How.*, 284, 318; *Easton* v. *Salisbury*, 21 *How.*, 426; *Reichart* v. *Felps*, 5 *Wall*, 160; *Best* v. *Polk*, 18 *Wall*, 112; *Smelting Co.* v. *Kemp*, 104 *U. S.*, 636; *Steel* v. *Smelting Co.*, 106 *U. S.*, 447, 453; *Wright* v. *Roseberry*, 121 *U. S.*, 488, 519; *Doolan* v. *Carr*, 125 *U. S.*, 618, 625, and authorities there cited."

It would seem that a question decided by a

decision of this court in 1815, and followed by this and all other courts passing upon it, should be deemed settled. If the grant attached to the specific odd sections at the date of filing the map of definite route, from that date until the present time the legal title to said land was in the company and not in the government, and a patent to plaintiffs in error therefor would not convey anything. A patent is but a quit claim deed from the United States, and if authorized by law, covers such interest in the land as the United States had at the time of issuing the patent, it by no means establishes that the title was in the government at the time of such issue. The law applicable to this case is well stated by Judge Knowles in the case of *N. P. R. R. Co. v. Amacker*, decided Nov. 14, 1892, not yet reported. Judge Knowles says:

"The ruling of the Commissioner of the general land office, or the Secretary of the interior, did not determine any right of plaintiff to the land in dispute. The ruling of the land department does not determine the right to, or ownership of land when the government has parted with the same, but only as to whether the government should issue or not, a patent to the land claimed by the applicant."

N. P. R. R. CO. v. Wright, 51 *Fed. Rep.* 71.
Iron Silver Mining Co. v. Campbell, 135 *U. S.* 292-3-4.

Wright v. Roseberry, 121 *U. S.* 518 *et seq.*
Miller v. Tobin, (*Or.*) 16 *Pac. Rep.* 162-163.
Stimson v. Clarke, 45 *Fed. Rep.* 760.
Megerle v. Ashe, 33 *Cal.* 83, 89.

Counsel for plaintiffs in error contend that the issuance of the patent would be conclusive evidence of the existence of facts showing that the predominating character of the land was mineral at the date the grant attached. Such is not the point involved here, and such would not be the fact. If a patent was issued to the plaintiffs in error for the lands involved in this controversy, it would be issued upon proofs made by them under the rules and regulations applicable to such cases, that a mine had been discovered therein in 1888, and that they had complied with the law, and the rules and regulations entitling them to a patent to such mining claims. The records in the interior department, in addition to the proofs made by the plaintiffs in error, would show that this land was surveyed in 1868 and returned as non-mineral; that the defendant in error filed its map of definite route in 1882, and constructed its road, and that the predominating character of the land at the date of filing such map and constructing the road as aforesaid, was agricultural and not min-

eral. This record would constitute the judgment roll upon which the patent would be issued, and it would show conclusively that there were no controverted or doubtful facts in the case. It would also show that the interior department had decided, as a question of law, upon which the patent issued, that it was the predominating character of the land at the date of issuing the patent, and not at the date of filing the map of definite route which determined whether or not the plaintiffs in error were entitled to the land. In such cases the record upon which the patent was issued would live as long as the patent, and at any time in the future it could be shown by said record that the issuance of the patent was a mistake of law on the part of the interior department. It has been the settled law of this court since the decision in *Stoddard* v. *Chambers*, *2 How., 318*, that "no title can be held valid "which has been acquired against law; * * * "the issuance of a patent is a ministerial act "which must be performed according to law."

(*h.*) *Plaintiffs in error also contend that the provision of section 4 of defendant in error's charter, that patents to the "lands as aforesaid shall "be issued to said company confirming to said "company the right and title to said lands," confers upon the Secretary of the interior power*

to determine whether or not any title passed to the company by virtue of the grant, and when such title attached to the specific section.

This, like all the other questions presented by the plaintiffs in error in this case, is not a new one; it has received the consideration of this court in a great many cases; one of the latest and most important of which is the case of *Deseret Salt Co.* v. *Tarpey, 142 U. S., 241.* In that case the court construed the Central Pacific grant; in section 4 of said grant it is provided that "patents shall issue *conveying* the "right and title to said lands to said company." Said section 4 is certainly as broad as section 4 of defendant in error's charter. In the Tarpey case, plaintiff, deraigning title from the Central Pacific Company, filed a complaint in the district court of the territory of Utah, in which he averred, among other things, that he was seized of the fee and entitled to the possession of the land, and also averred possession by defendant.

Upon the trial of said case Tarpey proved the grant to the Central Pacific Company, the filing of its map of definite route in 1868, a partial survey of the land, and that it was not mineral land at the date of filing said map, and that at said date it was free from pre-emption, homestead

and other claims and rights, and was not reserved. Defendant contended that said evidence did not show a grant to the Central Pacific Railroad Company of a legal title to the land involved in the controversy; defendant also claimed

"that in view of the provisions of the act for "subsequent patents and for payment of costs "and expenses of survey and patent, the grant "is in the nature of a promise to grant in the "future, and that until the subsequent grant is "made by patent after payment of fees and ex- "penses it is but an equity, and is not such a "legal title as is requisite to be shown in eject- "ment."

Rec. in said case (No. 96, 1889) 31.

The court instructed the jury as follows:

"1. * You are further instructed that it is established in this case by the stipulations of the parties that the lands in controversy here are the portions of an odd alternate section within the twenty mile limit of the grant to said corporation, and that said company filed its map of definite location as aforesaid in the department of the interior in October, 1868. You are instructed that unless at the time of the filing of said map the lands in controversy had been sold, reserved, or otherwise disposed of by the United States, or that some pre-emption, homestead, swamp land, or other lawful claim had attached thereto, or were known mineral lands, or were lands returned and denominated as such, or contained the improvements of any bona fide settler, they passed to and vested in the Central Pacific Railway Company of California and that said

company became the owner thereof from the dates of said acts of congress."

3. If you believe from the evidence that none of the lands described in the complaint, at the date of the filing of the map of definite location, to wit, October, 1868, were not known as mineral lands and had not been returned and denominated as such and were not then reserved from sale, and that no pre-emption, swamp land, or other lawful claim had then attached thereto, the plaintiff is entitled to the possession thereof, and you will so find."

Rec. in said case, 24.

The jury found a verdict for the plaintiff upon which the judgment was rendered. The defendant excepted to the said instructions.

Rec. said case, 27–8.

On writ of error to the supreme court of the territory, said court affirmed the judgment of the court below and held that, notwithstanding the broad language of section 4 of the Central Pacific charter, a legal title upon which an action of ejectment could be maintained attached to the land in controversy at the date of filing the map of definite route. This court, upon final review of the case, reached the same conclusion, and held that a legal title vested in the company and attached to the specific sec-

tions at the date of filing the map of definite route.

The Tarpey case involved and decided every point involved in this controversy.

See Citations Original Brief, pp. 117, 118, 119 and 120.

Notwithstanding the decisions aforesaid, counsel for plaintiffs in error contend that the decisions of the Secretary of the interior are final, and if adverse to the company divest the company's vested rights. This contention is based upon the assumption that the Secretary's decision amounts to "due process of law." It is conceded that the Secretary has no judicial power, that he is not authorized to issue subpœna or other compulsory process to secure the attendance of witnesses, or to obtain testimony; that he has none of the machinery which the experience of ages has found necessary to the investigation of the truth of any matter in controversy.

It cannot be seriously contended that the proceedings before the Secretary constitute "due "process of law" within the meaning of the provision of the constitution, or "an investigation "by judicial machinery" within the meaning of the decisions of the federal courts.

Trust Co. v. Ry. Co., 51 *F. R.*, 529.
Ry. Co. v. Minnesota, 134 *U. S.*, 418.

Davidson v. New Orleans, 96 *U. S.*, 97.
Taylor v. Porter, 4 *Hill, N. Y.*, 140.
Millet v. People, 117 *Ills.*, 294.
Dent v. W. *Virginia*, 129 *U. S.*, 114.
Gorman v. State, 34 *Alabama*, 216.
Seco v. Wenthrop, 37 *Me.*, 171.

Proceedings in mineral land cases in the interior department are *ex parte*.

Iron Silver Min. Co. v. Campbell, 135 *U. S.*, 286, and authorities cited on pp. 148 to 154 of our original brief.

This contention that the decisions of the Secretary of the interior upon mineral land claims within the grant to the Northern Pacific Company amount to "due process of law," is made in the face of the decision of the Secretary of the interior, December 16, 1891, 13 L. D., 691, in which the Secretary instructs the Commissioner of the general land office not to give the Northern Pacific Company notice of adverse decisions affecting its interest; assuming thereby that the decision in the Vallentine case was the settled law of the land, and that all other mineral contests were like it. Said decision and order of the Secretary of the interior has been in force every since December 16, 1891, and during all said time the Northern Pacific Company has not

been served with the usual notices of controversies affecting its interests; it has not only not had its day in court or been heard in said cases, but the Secretary has denied it the right of being heard; it is denied in such cases the right of review and the right of appeal; it is denied the privilege, granted to every beggar, of petitioning for its rights. This assumption of superior and unlimited jurisdiction, and of infallibility of judgment, and of the similarity of all cases, is the greatest monument of administrative folly of the present century. It has no precedent in history. If said contention and ruling obtains, vested property rights will not depend for their protection upon constitutional guarantees and well settled principles of law and equity, but upon the caprice of an administrative officer. We submit with great confidence that this court will not sanction such an absurd proposition.

(*i.*) *Counsel for plaintiffs in error contend that the use of the words "not mineral," in the granting clause of defendant in error's charter is conclusive evidence, taken in connection with the proviso excepting mineral lands, that congress intended to except therefrom all lands containing minerals.*

A careful reading of section 3 of said charter will show that this contention is not well

grounded. The material part of said section reads as follows:

"Sec. 3. * * * That there be and is hereby granted to the 'Northern Pacific Railroad Company' * * * every alternate section of public lands not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof."

Mineral lands are excepted from granted place lands under said section, but the provision authorizing the selection of indemnity lands contains no such limiting clause, and if the section stopped with this quotation, it would clearly appear therefrom that the railroad company would have the right to select any odd numbered section within the ten mile limit, whether mineral or not, for the purpose of obtaining the quantity of land granted. It, there-

fore, became necessary. in order to prevent the selection of mineral land as lieu land, to insert the proviso excluding from the operation of the grant all mineral lands. Read said section and construe it as you will, and it leads to but one result, viz., that congress intended to exclude from the operations and provisions of said act only mineral lands.

(*j.*) *Counsel for plaintiffs in error further contend that in order to sustain the judgment of the court below, the word "known" must be interpolated into said section 3 before the words "mineral lands."*

Such is not our contention; and we do not ask the court to interpolate into the grant or eliminate therefrom a single word; all we ask the court to do is to give the words "mineral lands," as used in the charter of defendant in error, the well settled interpretation which they had received at the date of the grant, and at the date of the joint resolution of May 31, 1870, extending and enlarging the grant; and the same construction which said words have received in all other land legislation.

Respectfully submitted,

JAMES McNAUGHT,

For Defendant in Error.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892

No. 908.

RICHARD P. BARDEN et al.,
Plaintiffs in Error,

vs.

NORTHERN PACIFIC R. R. Co.,
Defendant in Error.

Reply to Supplemental Brief Filed by Assistant Attorney General Shields, January 31, 1892.

JAMES McNAUGHT,
For Defendant in Error.

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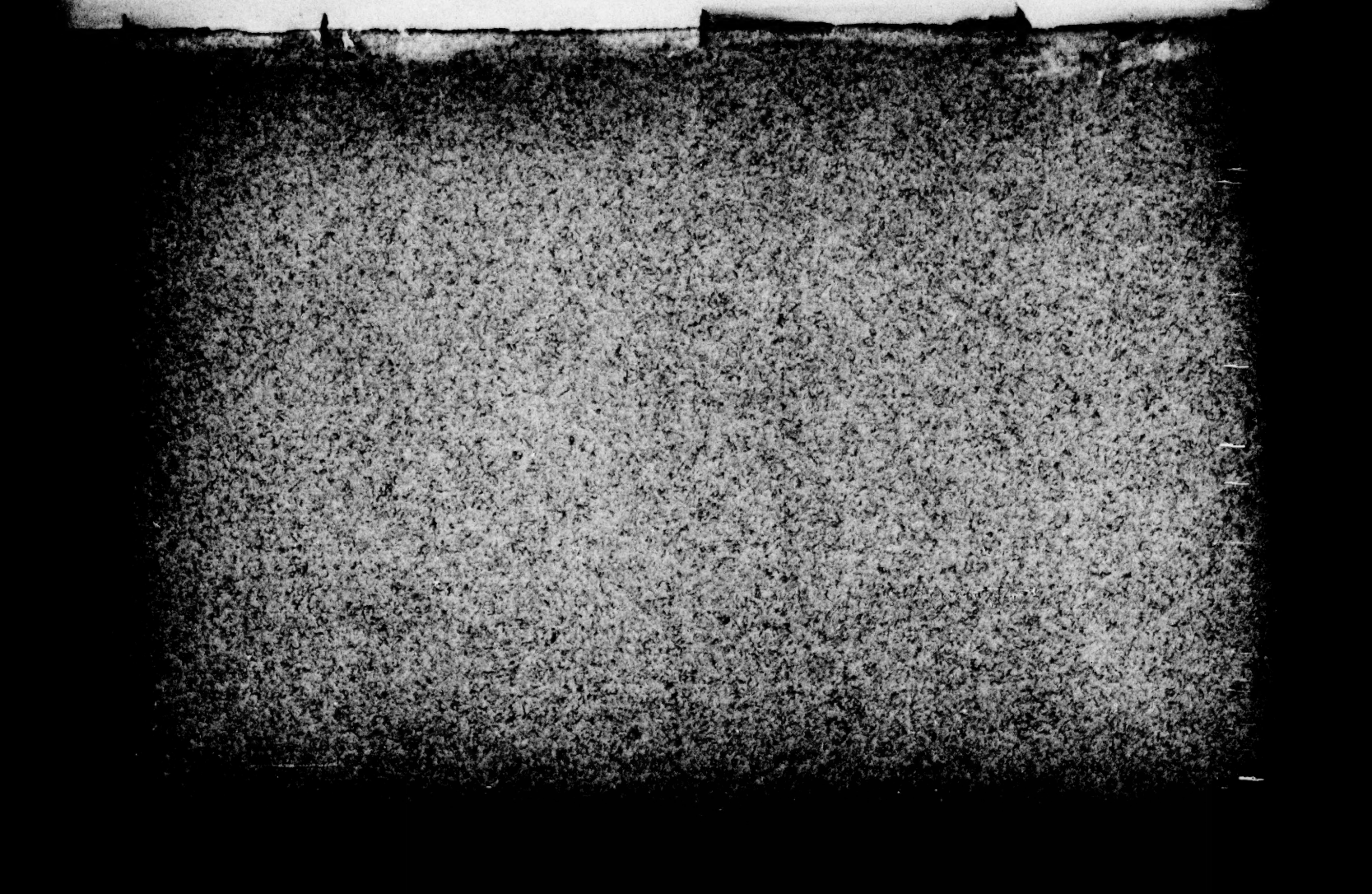

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Reply to Supplemental Brief filed by Assistant Attorney General Shields, January 31, 1893.

I.

On page 2 of said supplemental brief, counsel says:

"After the definite location there could be no investigation under this contention, because the odd sections within the lateral limits established by that definite location passed from the United States, and an indefeasible title to the land would vest in the grantee, regardless of the subsequent developments, increasing its mineral value."

Why there could not be an investigation after the fixing of the definite route for the purpose of determining the character of the land does not appear; no reason is assigned by counsel, and we are unable to conceive of any. Our contention is that it is the known or obviously apparent condition of the land at the date

of definite location of the line of the road that determines if it be granted as non-mineral, or excluded as mineral; as the result of this position, we contend that this filing of the map of definite location brings into existence all the facts necessary to enable the company, the courts, the revenue officers of the United States, and the officers of the United States, to identify the land and determine whether or not its predominating character was mineral at the date of filing said map. It is not claimed or contended that the investigation into the known or apparent character of the soil should be made at the date of definite location, but that the investigation, when it is made, even if years after the definite location, should be directed to what its character was at that date.

The interior department, to which the learned counsel has acted as chief legal adviser for the past four years, has, during that period, as for many years prior thereto found no difficulty in investigating the mineral character of the school sections 16 and 36, for the purpose of determining if they be excluded from those grants, although it is quite as difficult to tell in advance of survey what tracts will be sections 16 or 36 as it is to tell in advance of the definite location of the railroad line which will be the odd numbered sections within the limits of the grant, although he concedes that, under these grants, if the land be not known or obviously apparent mineral land at such date of survey, "an "indefeasable title to the land would vest in the "grantee, regardless of subsequent developments in-"creasing its mineral value."

The interior department has found no difficulty after the definite location of the line of railroad in determining if the lands were, at the date of such definite location, "free from pre-emption or other claims or "rights."

If our definition of "mineral lands" as lands known to be mineral, or whose mineral character is obviously apparent so as to give them a greater value for mineral than agricultural purposes, is correct, and land be not mineral within this meaning at the date of definite loca-

tion, obviously on that date the title would pass to the company, and any investigation made to ascertain if it had passed, whether made by the interior department, by the courts, or by the company, and whether made within a day or a month, one year or ten after the definite location, would yet necessarily be confined to the facts upon which the question of the transfer depended, viz.: the predominating character at date of definite transfer.

Counsel in said supplemental brief still insist that they have shown that it is the predominating character of land at the date of the patent which determines whether or not it passes to the company under the grant or is excluded therefrom. No reason is assigned in any of the briefs filed for plaintiffsin error, or in the oral argument of any of the counsel, tending to sustain this contention. On the contrary, it is shown that at the date of issuing the patent, no parties are present, no hearing is had and no evidence is taken for the purpose of determining the predominating character of the land at that date. This court has uniformly held, since the decision in Stoddard *v.* Chambers, 3 How., 318, that the issuing of the patent is a purely ministerial act. The latest possible date, sustainable by reason or upon principle, at which the predominating character of the land is material, is the time when the Register and Receiver are considering the list of place lands filed by the company, with the affidavit and evidence attached thereto required by circular of instructions set forth in Second Lester's Land Laws, page 363, and on pages 51 and 52 of our supplemental brief.

At the date of making said certificate, or during the time the Register and Receiver are comparing said list with the records of the land office, no evidence whatever is taken as to the predominating character of the land. All the evidence, other than that shown by the records, is found in the affidavit annexed to the list; in said affidavit the company's agent is required to swear that the list does not

contain "prohibited" or "interdicted" mineral lands. This the company has uniformly construed as relating to the predominating character of land at the date when the grant attached; the date of filing the map of definite route. But if the circulars and instructions of the interior department should be amended so as to require proof of the predominating character of land to be taken, that proof would be taken in the usual way by the Registers and Receivers and would precede the signing and delivery of the final receipt, set out on page 52 of our supplementary brief. No evidence whatever has been taken concerning the predominating character of land at a date subsequent to the issuing of said certificate. After said certificate has been issued by the Registers and Receivers, they note upon the plats of their office the fact that the land belongs to the railroad company; this is notice to all the world that it is private and not public property, and that it cannot be taken under any of the land laws of the United States. Said certificate is evidence of the company's title to the land. Such a certificate has the same effect as evidence of the railroad company's title as the Receiver's receipt has in a homestead or preemption entry. The title, however, does not pass by either the receipt or the patent, but by the grant and attaches to the specific sections at the date of filing the map of definite route. The receipt, like the patent, is simply evidence of a pre-existing title. It was contended by the Attorney General in the argument, with some qualification, that it was the predominating character of land at the date of ordering the patents issued by the President, which determined whether or not it passed under the grant. We submit, however, that this contention cannot be maintained. The predominating character of land is subject to change, as we have shown fully in our original and supplemental briefs. In all cases the inquiry as to the predominating character must be limited to the time when the title attaches; it cannot be a later date.

At the date of filing the map of definite route, a legal title upon which an action of ejectment can be maintained attaches to the specific sections, which are free at that date from pre-emption, homestead and other claims or rights, in which the mineral character, as distinguished from mineral quality, does not predominate over the agricultural; it is then that the land ceases to be public and becomes private; it is at that date that the land ceases to be subject to be taken under pre-emption, homestead, townsite and other land laws; at that date the right of the company to mortgage its lands and thereby secure the money with which to complete its road vests; at that date the right of the company to select lieu or indemnity land attaches, and all the facts which are necessary to prove the predominating character of the land at that date existed, if the land was surveyed, and whenever the proof is made, either by the taxing officers of a state or territory, or in the courts in an action of ejectment, trespass, etc., or by the Register and Receiver in issuing the receipt hereinbefore mentioned, the inquiry is necessarily confined to an ascertainment of the predominating character of the land at the date the grant attached, as it is at that date the title passes to the company, if at all, and the predominating character of the land at that date is the only material question necessary to be considered; what it is at some subsequent time can have no bearing or influence upon the question.

Mineral lands are excluded by the granting act from the grant of lands in place; there is no such exclusion however in the provisions authorizing the selection of lands in lieu of lost place lands. This broad right of selection, without limitation, made it necessary to insert the mineral land proviso so often referred to in the briefs in this case; said proviso is to be construed, as all such provisos must be, in connection with the granting act. It must also be construed in connection with sections 4 and 6 of the charter providing for the survey of lands as required by the construction of the road, and the provisions for the issuance of

patents in confirmation of previously existing title as soon as a section of the road has been constructed. All said provisos taken together make it very clear that it was the intention of congress that the company should have its patents, as evidence of a title previously vested, as soon as it had completed each section of its road.

It is suggested in said supplemental brief that a large part of the grant was, at the date of filing the map of definite route, and is now, unsurveyed. We do not consider this question material. The decisions of the courts do not agree upon the question as to whether a title attaches to unsurveyed lands; some of the authorities hold that the same rule must be applied to railroad grants that has been applied to school grants; such authorities therefore hold that the grant attaches to the specific sections surveyed at the date of filing the map of definite route; but as to the unsurveyed sections the grant continues to be a float, in very narrow limits, however, after the filing of the map of definite route and until the surveys have been completed. When this question is presented, we will endeavor to meet it; we are not called upon in this case to discuss it.

We refer, however, to case of Deseret Salt Co., v. Tarpey, 142 U. S. 242, as bearing upon this question. In that case the land had been surveyed upon three sides and was bounded by water upon the other, and it was held by the court that the land was capable of being identified at the date of filing the map of definite route and that a legal title upon which an action of ejectment could be maintained attached to said land at said date.

II.

The doctrine of estoppel is urged as a reason for fixing the date of patent as the date when the predominating character of the land is decisive.

The patent under the Northern Pacific act is but the simulacrum of the grant. Says Senator Sanders: "The patent and the law harmonizing, the one is the "complement of the other. The law gives the title, "the patent makes the record of what the law has "done, and is impotent to change by a hair's breadth "that which the law Congress has willed."

Brief of Attorney-General Miller, 58.

And this has been the conclusion of every Court passing upon this question.

Wright *v.* Rosebery, 121 U. S., 488.
St. P. & P. R. R. Co. *v.* N. P. R. R. Co., 139 U. S., 1.
Deseret Salt Co. *v.* Tarpey, 142 U. S., 241.
Wisconsin C. R. R. Co. *v.* Price Co., 133 U. S., 496.

In this respect the patent under these grants differs materially from the patent issued to the grantee upon the confirmation of a Mexican grant, such as was referred to in Moore *v.* Shaw, 17 Cal., 199. There the patent was a conveyance. It passed more than was granted. Here, the patent can issue only for land granted and adds nothing to the title already vested. If it be issued for what is not granted, it is absolutely void for want of authority in the department to issue the same. And that it was issued under a mistake of fact caused by lack of full information is not material. It is none the less void.

W. P. R. R. Co. *v.* U. S., 108 U. S., 510.
McLaughlin *v.* U. S., 107 U. S., 526.
Dolan *v.* Carr, 125 U. S., 618.
Colorado Coal & Iron Co. *v.* U. S., 123 U. S., 307.

And whether the lack of information on the part of the government was peculiar to itself, or was common to all the world, as where lands containing metals secreted in their depths, unknown and unknowable, is immaterial. If the grant did not pass lands containing concealed minerals, the patent for such lands would be unauthorized and void. The title must vest under the grant or not at all. And if it vests under the grant, it must be because congress did not include in the term "mineral lands" lands containing metals, but which did not give evidence of their existence.

It must be constantly borne in mind that there are no controverted questions of fact in this case; there is no question here as to the physical character of the land at different dates; all of this is set out in the bill and admitted by the demurrer; it is technically and purely a question of law as to whether it is the predominating character of the land at some date prior to patent which determines whether or not it passes to the company under the grant or is excluded therefrom by reason of its predominating mineral character. The authorities cited by counsel for plaintiffs in error, with a few unimportant exceptions, relate to controversies between persons claiming lands under homestead, pre-emption and other land laws where the title was in the government. The question presented in those cases was a very different one from the one now under consideration. The title is not in the government, and has not been since the date of the grant and the filing of the map of definite route; the question as to whether the company obtained title to its lands is not ultimately and finally an administrative question. This court, the united states circuit and district courts, and all the courts passing upon the question, have uniformly held that the interior department has no jurisdiction for the purpose of inquiring into the company's title, or by any of its acts to divest said title, but that the duty of the interior department is confined exclusively to such an inquiry as will enable it to determine whether or not it will issue a patent. It has been

uniformly held that an erroneous determination of the department, especially where there were no facts in controversy, and where the question is purely one of law, cannot, under any circumstances, affect a title which has previously vested by virtue of a grant. It has been uniformly held that a title acquired by grant is higher and better evidence of title than a patent. But it is suggested by counsel for plaintiffs in error that if a patent has been issued to the company, the government is estopped by the patent from denying that the lands described therein are agricultural. We do not think the government is estopped in such cases; frequently the courts have, at the request of the United States, set aside patents issued by a mistake of law and fact. The question, however, is not material in this case, if a patent should be issued for the lands involved in this controversy to the mineral claimants it would not be issued to the company, and the controversy is confined to questions where the interior department, by a mistake of law, has issued a patent to a mineral claimant to lands the title to which had previously passed out of the government and vested in the railroad company. In such case it is conceded that the action of the executive officers in issuing the patent is ineffectual and cannot divest a previously vested title.

III.

On page 8 of his supplemental brief Assistant Attorney General Shields says:

"Neither congress, the department nor the courts, except the cases we are now reviewing, have ever declared that the mineral character must be known at the date of definite location."

We are much astonished to find such a statement in a printed brief written at the close of the argument in this case. During the trial we cited a large number of cases not now on review, in which this question had

been directly decided by the courts. The whole question was thoroughly reviewed by Judge Sawyer, Judge Sabine concurring, in the first presentation of the case of Frankcoeur *v.* Newhouse, 40 F. R., 618. On the second presentation of the same case (43 F. R., 238), Judge Sawyer instructed the jury as follows:

"But it has been held by the courts that only those lands are to be regarded as mineral lands within the meaning of the act of congress, which were known to be mineral, or which there was satisfactory reason to believe were mineral at the time of attaching of the right of the company to those particular lands. As it has been stated in the language of the courts, the words 'mineral land,' as used in the act of congress, mean land known to be mineral at the time the grant took effect, and attached to the specific land in question, or which there was satisfactory reason to believe were such at said time. Only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral at the time the grant attached to the land, is excepted from the grant."

In said case Judges Sawyer and Sabine were construing the Central Pacific grant. The language of that grant is, in all respects material to this question, similar to the Northern Pacific grant.

Judge Boreman, in his charge to the jury in case of *Deseret Salt Co. v. Tarpey*, covered this exact question. The instruction is quoted on page 62 of our supplemental brief. The supreme court of the territory of Utah and this court found no difficulty whatever in sustaining the instruction given the jury by Judge Boreman. In fact, that instruction, although excepted to by counsel at the time, was not seriously contested thereafter.

The exact question here presented was passed upon by Judges Colwell and Thomas in N. P. R. R. Co. *v.* Walker *et al*, 47 F. R., 681. It was also directly decided by Judge Knowles in N. P. R. R. Co. *v.* Wright, 51 F. R., 70.

A long list of decisions bearing directly upon this point are referred to in our original and supplemental briefs.

IV.

In discussing this proposition counsel say that, "unless this Court find that it is the pre-"dominating character of land at the date of filing the "map of definite route which determines whether or "not it inures to the company under the grant, then "this decision must be reversed." Such a result would not necessarily follow; if the court should find that it is the date fixed by Attorney General Miller in his argument, to wit, the date when the President ordered patent issued, when the right to the patent vests, that would be sufficient for all our purposes in this case. At that time the land had no other character than agricultural. The court may even go further and fix the date, Dec. 9th, 1886; the proceedings at that date before the Register and Receiver resulted in issuing the final certificate to the company; at that date the land had no other character than agricultural.

V.

On page 13 of said supplemental brief, counsel says that "the result of the affirmance of the "decision of the court below (Judge Sawyer's deci-"sion), in this case would be not only to enlarge the "grant against an oft-repeated exception of mineral "lands, but it would vest this corporation with the "boundless mineral wealth of the states through which "it passes."

The grant specifically defines the quantity of land to which the company is entitled, and which congress intended it should acquire by the grant; no decision of the court or ruling of the interior department can enlarge or limit that quantity, except by so ruling as to make it impossible for the company to obtain within its place and indemnity limits as defined by the original

granting act of '64 and the Joint Resolution of May 31, 1870, the quantity designated in said granting act.

In the case of St. P. M. & R. R. R. Co. *v.* N. P. R. R. Co , 139 U. S., 1, Judge Brewer found, and this court affirmed said finding, that there was not sufficient lands in the company's first and second indemnity limits in the state of Minnesota to make up for its loss of lands in place limits, and that the company was short in its grant in said state.

During Secretary Lamar's administration of the interior department an estimate was made of the company's losses in consequence of preemption, homestead, prior conflicting grant, reservation and other claims, and it was then ascertained that the company would be short in its grant; that there was not enough public lands in the indemnity limits, subject to selection, to make up for losses in the place limits. The estimate of the loss was then and is now about 1,000,000 acres; the exact amount of the loss cannot be definitely ascertained until all the lands included within the limits of the grant have been surveyed, but it has been clearly ascertained that there will be a large shortage in the grant. The holding by this court that lands which are now known to be mineral, but which there was no reason to believe were mineral when the grant attached are excepted from the grant, would increase largely that shortage.

It is intimated that the exceptive mineral land proviso authorizing "that agriculture lands in odd numbered sections nearest the line of said road may be "selected as above provided," empowers the company to select such lands from the nearest lands found outside of the first and second indemnity limits provided for in the original granting act and the Joint Resolution of May 31, 1870. Said provisions have never been so construed, The words "as above provided," as used in said act taken in connection with the intent and purpose of fixing said first and second indemnity limits, and the usual construction placed upon such grants, has been regarded as confining the company's right of selection to lands within said limits.

But, in ascertaining losses upon which to base the selections, the interior department is required to take into consideration the condition of the land at the date when the grant attached.

Under this same head, and on page 14 of said supplemental brief, Assistant Attorney-General Shields presenting the question of the effect of a decision in favor of our contention, says:

"It would unsettle hundreds of titles, overthrow the settled policy of the Government as to mineral lands and bring ruin and desolation upon the people of our great Western States."

Such considerations have but little, if any, place in an argument upon the questions we are now presenting, but inasmuch as they have been presented, we may be pardoned for answering them. All mineral claimants settling upon the surveyed and listed lands of the company, and all of its surveyed lands were listed many years ago, are in the exact position of the plaintiffs in error in this case; they went upon the lands with full knowledge that the company not only claimed them as passing to it under its grant, but that the Register and Receiver, agreed with the company in this contention and had furnished the company a final certificate as evidence of its title to the land, and had entered the fact upon the records of the land office, which was public notice to all the world that said lands belonged to the company. All persons entering upon the lands under such circumstances are wilfull trespassers; they went there taking their chances of the final culmination of this contention; they are not purchasers for value. On the other hand, to every mineral trespasser upon the company's lands, there are at least 1,000 *bona fide* purchasers of the lands for value, who have made their purchases relying upon the predominating and provable character of the land at the date the grant attached, and relying upon the correctness and accuracy of its condition as ascertained by government surveyors. The records of the interior

department show that but a very small amount of the company's lands have been patented. Counsel say in their briefs and oral arguments that minerals have been discovered in a number of such tracts of lands since their survey and return as agricultural; since the filing of the map of definite route, and since the purchase of such tracts of land and the payment therefore by the farmers and others living along the line of road.

An illustration of this is found in the discovery of mineral land in the city of Tacoma, as shown in the case of state of Washington *v.* John G. McBride, decided by the Commissioner of the general land office January 4, 1893, a copy of the opinion in which has been printed and filed in this case by leave of the Court. The public records show that a large part of the lands upon which the cities of Tacoma, Helena, Butte and other towns along the line of the company's road and within the limits of its grant, are located are upon lands which were purchased from the company years ago at a very small price per acre, and which are now in many instances worth several hundred dollars a foot front, and upon which improvements have been made valued at a great many millions of dollars. Minerals have been discovered in these lands since the filing of the map of definite route, the sale by the company and the making of said improvements thereon by *bona fide* purchasers; a decision that it is the predominating character of the land at the date of issuing the patent, and not at the date of filing the map of definite route, or the vesting of the right to the patent, or the issuing of the final certificate by the Register and Receiver, which determines whether or not its passes under the grant, would result in all the lands within said cities, and a very large amount of well improved agricultural property being dotted over with mineral land claims before the setting of the sun upon the day this court would render such a decision. The consequences to the people of that country would be disastrous; the entire possessions of *bona fide* purchasers would be swept away instantly.

It is said by Senator Sanders, an old resident of Montana who is very familiar with the condition of things in that state, that the Northern Pacific Railroad Company has administered its lands in a greater spirit of equity and statesmanship in Montana than the government has, and that the railroad company has been a better landed proprietor to the people than the government.

Brief Attorney General pp. 24, 25, 119.

It necessarily follows from this admission by counsel that the few tresspassers upon the company's lands will not be dealt with, notwithstanding they are trespassers, more harshly or in a less spirit of equity by the company than by the government. The railroad company expects to do business in said mineral states forever; it is to its interest to be at peace with the people and enjoy as far as possible their good will, and the facts and circumstances which have induced it to adopt a policy of such equity and fairness to the people in the past, as conceded by Senator Sanders and the Attorney General, present a fair presumption that it will continue such equitable and public-spirited policy in the future.

A decision in favor of our contention would not, as contended by Assistant Attorney-General Shields, overthrow the settled policy of the government in this particular, but, on the contrary, it would sustain its policy. The policy of the government, and the consequences of an affirmance or reversal of this case are fully set out in the decisions of Secretaries Schurz, Vilas and Noble, in the cases cited in our original brief, to wit:

State *v.* Poley and Thomas, Sickles Mining Laws and Decision, 426.
Virginia Lode, 7 L. D., 459.
Abraham L. Miner, 9 L. D., 408.

The decisions of said Secretaries, especially of Secretary Noble in said Miner case, so fully answer the contention of Assistant Attorney-General Shields that we submit the question without further comment.

Respectfully submitted,

JAMES McNAUGHT,

For Defendant in error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

RICHARD P. BARDEN ET AL.,
PLAINTIFFS IN ERROR,

v.

NORTHERN PACIFIC RAILROAD COMPANY.

No. 612.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR ATLANTIC & PACIFIC R.R. CO.

By Permission of the Court.

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GEO. R. PECK,
General Solicitor.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

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STATEMENT.

The grant to the Northern Pacific Railroad Co. is of "every alternate section of public land, *not mineral*, "designated by odd numbers," for prescribed amount, and with proviso (*inter alia*) "that all *mineral lands* be, "and the same are hereby, excluded from the operations "of this act, and in lieu thereof a like quantity of un- "occupied and unappropriated agricultural lands, in odd-

" numbered sections, nearest to the line of said road, may " be selected as above provided: *And provided further*, " That the word 'mineral,' when it occurs in this act, " shall not be held to include iron or coal."

The important question here presented for determination is:

WHEN DOES THIS EXCEPTION OF "MINERAL LANDS" CEASE TO OPERATE?

And subordinate thereto:

TO WHAT LAND DOES THE EXCEPTION APPLY?

The grant was made to aid "in the construction of " said railroad," and hence involves sale and disposal of the lands by the grantee for that purpose. The essential elements of CERTAINTY and STABILITY of title alike affect the Company and its numerous grantees, and render clear and final determination of these questions matters of supreme importance.

The grant to the Atlantic & Pacific Railroad Co. (14 Stats. 292) contains identical language. Hence that Company and its grantees have great and direct interest herein. On their behalf this brief is submitted.

By act approved July 2, 1864 (13 Stats. 365), Congress incorporated the Northern Pacific Railroad Co., and conferred upon it grants of right of way, material, and lands, to aid construction of a railroad "from Lake Superior to " Puget's Sound on the Pacific Coast." Section three contains the grant of land, as follows:

"SECTION 3. *And be it further enacted*, That there be, " and hereby is, granted to the 'Northern Pacific Railroad " ' Company,' its successors and assigns, for the purpose

" of aiding in the construction of said railroad and tele-
" graph line to the Pacific Coast, and to secure the safe
" and speedy transportation of the mails, troops, muni-
" tions of war, and public stores over the route of said
" line of railway, every alternate section of public land,
" not mineral, designated by odd numbers, to the amount
" of twenty alternate sections per mile, on each side of
" said railroad line, as said Company may adopt, through
" the territories of the United States, and ten alternate
" sections of land per mile on each side of said railroad
" whenever it passes through any State, and whenever on
" the line thereof, the United States have full title, not
" reserved, sold, granted, or otherwise appropriated, and
" free from pre-emption or other claims or rights, at the
" time the line of said road is definitely fixed, and a plat
" thereof filed in the office of the Commissioner of the
" General Land Office; and whenever, prior to said time,
" any of said sections or parts of sections shall have been
" granted, sold, reserved, occupied by homestead settlers,
" or pre-empted, or otherwise disposed of, other lands
" shall be selected by said Company in lieu thereof, under
" the direction of the Secretary of the Interior, in alter-
" nate sections, and designated by odd numbers, not more
" than ten miles beyond the limits of said alternate sec-
" tions: *Provided*, That if said route shall be found upon
" the line of any other railroad route to aid in the con-
" struction of which lands have heretofore been granted
" by the United States, as far as the routes are upon the
" same general line, the amount of land heretofore granted
" shall be deducted from the amount granted by this act:
" *Provided further*, That the railroad company receiving
" the previous grant of land may assign their interest to
" said 'Northern Pacific Railroad Company,' or may con-
" solidate, confederate, and associate with said Company
" upon the terms named in the first section of this act:
" *Provided further*, That all mineral lands be, and the
" same are hereby, excluded from the operations of this
" act, and in lieu thereof a like quantity of unoccupied and
" unappropriated agricultural lands, in odd-numbered sec-
" tions, nearest to the line of said road, may be selected

" as above provided: *And provided further*, That the " word 'mineral,' when it occurs in this act, shall not be " held to include iron or coal: *And provided further*, That " no money shall be drawn from the Treasury of the " United States to aid in the construction of said 'North- " 'ern Pacific Railroad.' "

The case involves the right of possession to parts of an odd-numbered, unpatented section within the place limits of the grant. The Company's complaint avers and the demurrer admits—

1. That the premises were not known as mineral, but as agricultural land at date of railroad grant (July 2, 1864); at date of filing map of general route prescribed by section six thereof (February 21, 1872); at date of filing with and acceptance by the Land Department of the map fixing the definite location of the road (July 6, 1882); at date of construction and the Government's acceptance of the road opposite this land (1883); and at date of the Company's selection thereof in due form at the proper local land office (November 8, 1886).

2. That at date of grant, filing of maps of general route and definite location, the land was not within any of the exceptions prescribed in section three of the grant *supra*.

3. That the official Government survey thereof in 1868, as made, returned, examined, approved, and accepted by the Land Department, identified the premises as part of an odd-numbered section, and pursuant to law and regulations the same was thereby officially returned, and has since remained classified by such survey as agricultural land.

4. That in 1888 defendants entered thereon, discovered and located certain lodes or veins of rock in place " bearing gold, silver, and other precious metals," and have since remained in possession thereof, engaged in extracting ore therefrom.

Upon these admitted facts the presiding Circuit Judge (Sawyer), in an elaborate opinion, held:

"Under these various decisions of the Supreme Court, "and others cited by that tribunal with approbation, I am "satisfied that to exclude the lands from the operation of "the grant they must be known to be mineral at the date "when the line of the road becomes definitely fixed and a "plat thereof filed in the General Land Office—in this "case on July 6, 1882—and that the demurrer to the "complaint must be overruled."

Rec. 29.

His associate (Knowles, J.) dissented from this view, delivered an extended opinion, and held the mineral exception and inquiry operative "until patents are issued "which will identify the lands granted to plaintiff." * * *

Rec. 44.

ARGUMENT.

I.

The railroad company seeks to recover upon the strength of its legal title as conveyed by the grant, no patent having issued to it thereunder. This it may do subject to defendant's right to show its want of title by reason of the inclusion of the demanded premises within some of the exceptions expressed in the grant. This was the precise question in *Deseret Salt Co.* v. *Tarpey* (142 U. S. 241, 254), involving unpatented lands within the grant to the Central Pacific R.R. Co., and the Court held:

"From this view of the interest conveyed by the grant "which we have expressed, we are satisfied that the Com-"pany could maintain an action for the possession of the "premises in controversy, and that its lessee, the plaintiff "herein, was possessed of the same right."

II.

The briefs submitted by counsel for the railroad company give full recital of the legislation of Congress concerning the mineral lands, and like full recital of judicial interpretation and Executive ruling thereunder. Such full recital here would not add to the weight of argument nor assist the labors of the Court. We hence assume, from the great and commendable industry of counsel, certain postulates which are not open to just contention.

A.

The term "mineral lands" includes only such as are *valuable* for minerals. This is the concession of the Government's brief (pp. 33, 34); the express language of the law providing for their exploration and purchase (sec. 2319, R. S.) and the distinct holding of this Court.

Deffeback v. *Hawke*, 115 U. S. 392, 404.
Davis v. *Weibbold*, 139 U. S. 507, 519.

In the Land Department, relative value for mining or agricultural purposes has always been the controlling test. The rule was so applied in *Berry et al.* v. *Central Pacific R. R. Co.*, decided November 19, 1892 (15 Land Decisions, 463), the Secretary observing that—

"Rulings to the same effect upon applications for mineral patents are found in decisions of the Department for many years."

B.

Throughout the legislation of Congress the words "mines," "known mines," "mineral lands," "valuable

"mineral lands," and like terms are used synonymously, and this Court has so construed them.

The volume entitled "The Public Domain," published by authority of Congress, and prepared by the Public Land Commission, created under the act of March 3, 1879, gives (chapter xxvi) full and connected history of the legislation of Congress and recommendations of the Executive on this subject. As a valuable and reliable source of information it is commended to the consideration of the Court.

Such legislation shows:

1*st*. That in all acts of Congress the words "mines"; "lead mines"; "copper, lead, or other valuable ores"; "mineral lands"; "known salines or mines"; "lands "valuable for mines of gold, silver, quicksilver, or copper"; "the mineral lands of the public domain"; "lands val- "uable for minerals"; "valuable mineral deposits," have been used as expressive of a common intent, well illustrated by the resolution of February 6, 1839:

"That the President be requested to cause to be pre- "pared a plan for disposal of the public *mineral* lands."

2*d*. That special terms of description employed in one act have been followed by the use of the generic term in the same law. Thus the acts of March 1 and 3, 1847 (9 Stats. 146, 179), directed (sec. 2) the sale of "such of "said lands as may contain copper, lead, or other valuable "ores"; and provided (sec. 4) "That the said *mineral* "*lands* shall be offered for sale in quarter sections," &c. And section 5 of the latter act transferred "the manage- "ment and control of the *mineral lands*" from the War to the Treasury Department.

This legislative uniformity of intention and expression

is broadly stated in *Deffeback* v. *Hawke* (115 U. S. 392, 400), thus:

"In several acts of Congress relating to the public "lands of the United States, passed before July, 1866, "lands which contained minerals were reserved from sale "or other disposition. Thus, the pre-emption act of "1841 (5 Stat. 453) excepts from pre-emption and sale "'lands on which are situated any known salines or "'mines' (*ib.* 455, ch. 16, par. 10), and the act of 1862 "extending to California the privilege of settlement on "unsurveyed lands, previously authorized in certain "States and Territories, contains a clause declaring that "the provisions of the act 'shall not be held to authorize "'pre-emption and settlement of mineral lands' (12 Stat. "409, 410, ch. 86, par. 7). Similar exceptions were made "in grants to different States and in grants to aid in the "construction of railroads. Thus, in the grant to Cali- "fornia of ten sections of land, for the purpose of "erecting the public buildings of that State, there is a "proviso 'that none of said selections shall be made of "'mineral lands' (10 Stat. 244, 248, ch. 145, par. 13). "And in the grants to the Union Pacific Railroad, and "its associated companies, to aid in the building of the "transcontinental railroad and branches, there is a pro- "viso declaring that all mineral lands other than of coal "and iron shall be excepted from them (12 Stat. 489, ch. "120, par. 3; 13 Stat. 356, 358, ch. 216, par. 4). A sim- "ilar exception is made in grants for universities and "schools; and, in the law allowing homesteads to be se- "lected, it is enacted that mineral lands shall not be liable "to entry and settlement for that purpose."

III.

Throughout all legislation relating to this subject, and all judicial interpretation and Executive practice thereunder, the exception of "mineral lands" is made operative and dependent solely upon their *known* condition as

such at the date of sale, entry, or grant. The exception is *not* held to be continuing and operative for all future time. This contention is broadly made because fully supported by express statute, by original reasoning, and by controlling precedent. *When* this investiture of title obtains, whereby the exception is extinguished and all future discoveries *of* mineral are thereafter ineffectual to defeat or cloud such title, is *the* great and controlling question here. Preliminary to that discussion we submit:

When the United States acquired a great public domain through the Virginia cession, and subsequent treaties, the settled law and policy which had obtained for centuries in all civilized countries reserved the valuable minerals to the use of the sovereign or crown. Grants or estates in the *soil*, by whatever tenure created, were thus held in servitude to the sovereign and subject to his right to extract the underlying minerals. The subject could only engage in the business of extracting such minerals by the royal grant or favor, and on return of such share therefrom into the royal revenue as the sovereign should require. This right was deemed inherent in the crown and a fixed attribute of sovereignty of like tenor with the existence and exercise of the power of eminent domain. An express grant of such minerals from the sovereign was held to cease on the death of the sovereign grantor unless revived or confirmed by his royal successor. But this rule and policy never obtained in the United States. By the ordinance of May 20, 1785, for the disposal of lands in the "western territory" it was ordered that there should be reserved "one-third part of all gold, silver, "lead, and copper mines, to be *sold*, or otherwise dis-"posed of as Congress shall hereafter direct." By early legislation salt springs and lead mines were reserved from sale. By the act of March 3, 1807 (2 Stats. 440), the

President was authorized to lease the lead mines in the Indiana Territory. But this policy of leasing yielded little revenue and was found unsatisfactory. By act of March 3, 1829 (4 Stats. 364), Congress directed the President to sell *as other public lands* "the reserved lead "mines and contiguous lands in the State of Missouri." By the act of July 11, 1846 (9 Stats. 37), this direction was extended to the States of Illinois and Arkansas and the Territories of Wisconsin and Iowa. By acts of March 1 and 3, 1847 (9 Stats. 146, 179), the lands in the upper peninsula of Michigan and the Chippewa land district, Wisconsin, found on examination to contain "copper, "lead, or other valuable ores" were directed to be advertised and sold at the minimum price of $5 per acre, those unsold to remain subject to private entry at the same price.

Following the discovery of gold in California in 1848, mining therefor was pursued by thousands, without interference from the Government. Such trespass was expressly recognized and condoned by act of February 27, 1865 (15 Stats. 441, sec. 9). On July 26, 1866 (14 Stats. 86), Congress provided a general law for the exploration and sale of the mineral lands, and this act has from time to time been amended and altered.

This brief recital is sufficient to show that, in exercise of undoubted power, Congress has made *sale* of the mineral lands, for a nominal price, precisely as of agricultural lands, and has as to each class conveyed thereby the *entire* fee. Save for the original reservation contained in the ordinance of [illegible], and soon abandoned, no attempt was ever made to except or reserve the underlying mineral in any sale, entry, or grant of the soil, with the exception (1) of town sites upon the mineral lands wherefrom *known* mines and mining claims are expressly excepted (secs.

2386, 2392, R. S.), and (2) *known* lodes or veins in placer mines, where the failure of the placer mineral claimant to embrace and describe them in his application for patent is declared by statute a waiver of his right thereto (sec. 2333, R. S.). These exceptions stand in entire harmony with the contention here made, and the construction given these sections by the Court largely aids the argument, as will hereafter appear.

This uniform legislation providing for the sale of *land*, and conveying thereby the entire interest of the United States in the soil, including all *unknown* minerals, finds early recognition in express statutes. The act of March 26, 1804 (2 Stats. 277), provided for the sale of the public lands in the Indiana Territory "with the exception of "the salt springs and lands reserved for the use of the "same." Sec. 6 thereof declared:

"And any grant which may hereafter be made for a "tract of land containing a salt-spring *which had been* "*discovered previous to the purchase of such tract from the* "*United States* shall be considered as fraudulent and "null."

The act of March 3, 1807 (2 Stats. 448), providing for the sale of certain lands now in Ohio and Indiana, contains (sec. 5) a similar provision reserving the lead mines, and adds:

"And any grant which may hereafter be made for a "tract of land containing a lead mine *which has been dis-* "*covered previous to the purchase of such tract from the* "*United States* shall be considered fraudulent and null."

The general pre-emption law of September 5, 1841 (5 Stats. 455, sec. 2258, R. S.), prohibits entry thereunder of "lands on which are situated any *known* salines or mines."

The special act of August 23, 1842 (5 Stats. 521), permitted certain settlers in Wisconsin to make proof and entry upon lands theretofore refused "in consequence of "the *mineral character* of the tract of land applied for," but with the proviso "that no tract shall be entered by "any settler claiming under this act which contains "mines or *discoveries* of lead ore," &c.

Moreover, the reservation of mineral lands from ordinary sale and disposal necessarily could apply only to lands *known* to be thus valuable for minerals. The language, purpose, and effect of all such legislation could have no operation upon any other character of lands, and that it was so restricted is plain upon original reasoning. In the early legislation the express reservation of lead mines and salt springs (with designated number of surrounding sections for their convenient working) from public offerings and private entry could apply only to lands of such *known* mineral or saline character. Otherwise how could such lands and the contiguous sections so reserved be identified and thus omitted from public sale or kept withdrawn from private entry? The act of March 3, 1853 (10 Stats. 244), directed (sec. 3) that, in surveying public lands in California, only the exterior township lines should be run "when the lands are mineral." This direction was impossible of execution except as applied to lands of *known* mineral character. And secs. 6 and 7 thereof prohibited settlement, location or entry of such "mineral lands," necessarily meaning thereby lands of *known* mineral character.

In 1856 (1 Lester, 645) the Secretary of the Interior held:

"Here, whenever a grant has been made of land, and "any lead or copper mines were discovered in them, the "latter passed to the grantee."

And such has always been the Executive rule.

In *Deffeback* v. *Hawke* (115 U. S. 392, 404) this Court said:

"The exception of mineral lands from pre-emption and "settlement, and from grants to States for universities and "schools, for the construction of public buildings, and in "aid of railroads and other works of internal improve- "ment, are not held to exclude all lands in which min- "erals may be found but only those where the mineral is "in sufficient quantity to add to their richness and to "justify expenditure for its extraction, *and known to be so* "*at the date of the grant.* There are vast tracts of country "in the mining States which contain precious metals in "small quantities, but not to a sufficient extent to justify "the expense of their exploitation. It is not to such "lands that the term mineral, in the sense of this statute, "is applicable.

"On this subject there has been great uniformity of "decision by those courts of the States and of the United "States which have had the most frequent occasion to "consider the subject, and by the Land Department."

In *Davis' Adm'r* v. *Weibbold* (139 U. S. 507) a prior patent issued under the town-site laws, and a junior patent issued for a lode mining claim, formed the foundation for conflicting claim of title. The claimant under the town-site patent offered, upon trial, to show (p. 514) that "at "the time the patent of the Butte town-site to the probate "judge was issued in trust for its occupants the prem- "ises embraced by the Gold Hill lode were *not known to* "*be valuable for minerals of any kind.*" The trial court excluded this evidence, and the Supreme Court of Montana affirmed its ruling and judgment adverse to the town-site claimant. This Court reversed such judgment and rendered elaborate opinion, holding (p. 519):

"The exceptions of mineral lands from pre-emption "and settlement, and from grants to States for universi- "ties and schools, for the construction of public build- "ings, and in aid of railroads and other works of internal "improvement, are not held to exclude all lands in which "minerals may be found, but only those where the min- "eral is in sufficient quantity to add to their richness *and* "*known to be so at the date of the grant.*"

IV.

Assuming from foregoing discussion that the exception of "mineral lands" from the railroad grant applies only to lands *valuable* for minerals, and *known* to be such at the time when title *vests* under the grant, the important question for determination is, when does such investiture of title occur, so as to render this exception thereafter inoperative and ineffectual? The Circuit Judge decides the exception thus inoperative from the act and date of filing and acceptance of the map of definite location of route whereby the specific sections granted are identified. The District Judge held the exception operative and the mineral inquiry open until issue of patent.

In approaching this question three factors of prime importance should be kept in view.

First.

The decision herein must furnish a rule of clear and certain application. Certainty and stability of titles is matter of prime necessity. Congress did *not* by expression or intendment insert in this grant a condition of unknown scope and operation and yet existing throughout all time. Such result would be against all rules and principles which apply in the transfer and holding of real

property. The grant is not of the soil, reserving the underlying minerals—a form of exception well understood for ages. Hence all assumed analogies drawn from such form of exception, whether by sovereign or individual, have no application here. The exception is of the "mineral lands." The entire *corpus* is excepted. But this grant, in the hands of the railroad company and its numerous grantees, cannot be burdened, as it passes from man to man, through all succeeding years, with this constant possibility of destruction of title through the uncertainty of what may be hereafter found hidden from sight therein. The arbitrary date of patent will not settle the doubt nor create the estoppel supposed, for reasons which we shall hereafter state. There must be found a point of time certain in itself—an act which has direct, clear, and logical relation to the grant, and which fixes and determines the complete right and title of the railroad grantee, and thence onward closes the door.

SECOND.

There is nothing sacred or exclusive about the mineral lands of the public domain. They are not withheld from private ownership or sale; on the contrary, the settled policy of many years has been to stimulate development of the precious metals through sale of the *land* at nominal price. All forms of mineral deposit other than those found in veins or lodes are sold by the Government at $2.50 per acre—the exact statutory price of the even sections of agricultural lands within railroad limits. Lands containing vein or lode claims are sold at $5 per acre although they may yield to the purchaser enormous wealth. The special requirement of limited expenditure in mining improvements imposed by the law precedent to patent is intended

solely as evidence of *bona fides* in the purchaser. The theory was, and the result has proved, that private ownership of mineral lands stimulates their development and the extraction of the precious metals therefrom. Indeed the assertion may well be made that the millions spent in unsuccessful effort and in searching for valuable minerals where none are found bears fair comparison with the millions produced in successful mining operations. Private ownership, whether corporate or individual, is by the demonstrated test of experience the sure means whereby the valuable minerals are produced and added to the nation's wealth. *How* that ownership may be acquired becomes, in such view, wholly immaterial.

THIRD.

Congress has long since voluntarily removed all mineral exceptions and restrictions in the sale and disposal of public lands in the States of Michigan, Wisconsin, Minnesota, Kansas, and Missouri (17 Stats. 465, sec. 2345, R. S.; 19 Stats. 52), and all lands therein have since been classified and sold as agricultural. Yet in those States iron, coal, lead, copper, and other minerals of great value are being found.

The statutes of Congress in reserving mineral lands from sale or entry under the pre-emption and other settlement laws, and from grants to States and corporations for educational or internal improvement purposes, stand upon the same basis, are governed by the same policy, and "are certain to a common intent." This Court has so ruled.

Deffeback v. *Hawke*, 115 U. S. 392, 400.

Hence it follows that the application of the law should be uniform; the exception applied with equal force, and its extinguishment held operative in all cases from that moment of time when, by the plain effect of the sale or the language of the grant and express judicial construction thereof, the *title* has so vested that it cannot be lawfully divested by *subsequent* ascertainment of the mineral character of the land thus sold or granted.

Herein plain analogy applies:

In *Witherspoon* v. *Duncan* (4 Wall. 219) the Court said:

"In either case" (donation to a settler or a purchaser at cash entry), "when the entry is made and certificate "given, the particular land is segregated from the mass "of public lands and becomes private property. In the "one case the entry is consummated when the money is "paid, in the other when the required proofs are furnished. "In neither can the patent be withheld if the original "entry was lawful."

The effect of this entry and sale is applied by this Court in *Colorado Coal Co.* v. *United States* (123 *U. S.* 307, 323), where patents on certain pre-emption entries were sought to be cancelled (*inter alia*) because they embraced "known "mines" of coal. In denying the relief sought upon the proofs made this Court said:

"A change in the conditions occurring *subsequently to* "*the sale*, whereby new discoveries are made, or by means "whereof it may become profitable to work the veins as "mines, cannot affect the title as it passed at the time of the "*sale*. The question must be determined according to "the facts in existence at the time of the *sale*. If upon "the premises *at that time* there were not actual 'known "'mines' capable of being profitably worked for their "product, so as to make the land more valuable for min-"ing than for agriculture, a title to them acquired under "the pre-emption act cannot be successfully assailed."

This doctrine was applied in *Harnish* v. *Wallace* (13 Land Decisions, 108), where attempt was made to defeat the unpatented pre-emption entry of Wallace upon the allegation of subsequent discovery of mineral. The Department held:

"In order to defeat the entry, on the ground of mineral "character of the land, it must be shown that mineral "was known to exist *at the time of the entry*, and a dis- "covery of mineral made, as in this case, more than four "years after the allowance of the entry, will not warrant "its cancellation. *Nicholas Abercrombie*, 6 L. D. 393; "*Abraham L. Miner*, 9 L. D. 408; *Thomas J. Laney*, *ib.* "83; *Plymouth Lode*, 12 L. D., 513; see also *Colorado* "*Coal & Iron Co.* v. *United States*, 123 U. S. 307-328."

The grant of sections 16 and 36 in every township to the States for support of common schools is held to be a grant *in præsenti*, the title passing to the specific sections when same are identified by the official survey.

Cooper v. *Roberts*, 18 *How.* 173, 179.

In *Mining Co.* v. *Consolidated Mining Co.* (102 U. S. 167) this Court held that lands valuable for minerals were excepted from the school grant to California, the Court observing:

"It follows from the finding of the Court and the un- "disputed facts of the case that the land in controversy "being mineral land, *and well known to be so when the* "*surveys of it were made*, did not pass to the State under "the school-section grant."

And such has been the uniform ruling of the Land Department.

In *State* v. *Poley & Thomas* (*Sickles' Mining Laws and Decisions*, 426; *s. c. Copp's Land Owner*, vol. 4, p. 18),

involving a school section in California, after full review of the authorities and discussion of the reason of the law, Mr. Secretary Schurz said:

"I must therefore hold that the discovery of the mineral character of the land in sections 16 and 36 subsequent to survey does not defeat the title of the State to the same as school lands."

In *Abraham L. Miner* (9 Land Decisions, 408) the judicial and Executive decisions are reviewed at length by Mr. Secretary Noble, who concludes:

"As the title vests at the date of *sale* in pre-emption and private cash entries, and according to the 'established doctrine of the Courts' the title of the State vests in school lands at *date of survey*, the principle announced in foregoing cases is applicable to the case under consideration, and those cases are authority for the proposition that the discovery of the mineral character of school lands after the title has passed to the State on survey thereof will not affect or divest that title."

In *Mullan* v. *United States* (118 *U. S.* 271) the Government asked cancellation of the title claimed under the State of California by selection of the land as indemnity for a school section otherwise disposed of; and this upon the ground that at date of selection by the State and at date of the certification of the land thereunder by the Land Department same was known to be valuable coal land, both to the State officers and Mullan *et al.*, her grantees. This Court found (p. 277)—

"That the land now in dispute was '*known*' coal land "*at the time it was selected* no one can doubt," and the ruling was (p. 278):

"At the time the selection was actually made, therefore, "it cannot be doubted that the land was mineral land, "both in law and in fact, within the meaning of the act "under which the State and those who purchased from the "State undertook to acquire title, and we agree with the "Circuit Court in opinion that the rights of the parties "are to be determined by the law as it stood then. Such "being the case, we have no hesitation in deciding that "the land was not open to the State for selection."

And this because held to be *known* mineral land at date of *selection*, and hence excepted from appropriation or selection under the school indemnity grant.

It is well established by the authorities that the certificate of entry issued to the pre-emptor does not vest the legal title. That remains in the United States until issue of patent.

Carroll v. *Safford*, 3 *How.* 441, 461.

And the entry is subject to cancellation by the Land Department if not made in accordance with law.

Witherspoon v. *Duncan*, 4 *Wall.* 210, 220.

And the legal title under selection of indemnity school lands vests in the State on formal certification thereof by the U. S. Land Department.

Frasher v. *O'Connor*, 115 *U. S.* 102, 116.

Nevertheless the authorities *supra* hold that both in case of a pre-emption entry and of indemnity school selections it is the *known* character of the land at date of entry and at date of selection which controls. Yet mineral lands are equally and expressly excluded from acquisition under either pre-emption entry or indemnity school grant.

The grant to this Railroad Company is of far stronger force and effect. In *St. Paul & Pacific* v. *Northern*

Pacific (139 U. S. 1, 5), and speaking of this identical grant, this Court said:

"The language of the statute is 'that there be, and 'hereby is, granted' to the Company every alternate 'section of the lands designated, which implies that *the property itself is passed*, not any special or limited 'interest in it. The words also import a transfer of a '*present* title, not a promise to transfer one in the future.

"The route not being at the time determined, the grant 'was in the nature of a float, and the title did not attach 'to any specific sections until they were capable of identi-'fication; but when once identified the title attached to 'them as of the date of the grant, except to such sections 'as were specifically reserved. It is in this sense that 'the grant is termed one *in præsenti*; that is to say, it 'is of that character as to all lands within the terms of 'the grant, and not reserved from it at the time of the 'definite location of the route.

"This is the construction given to similar grants by 'this Court, where the question has been often con-'sidered; indeed, it is so well settled as to be no longer 'open to discussion. *Schulenberg* v. *Harriman*, 21 Wall. '44, 60; *Leavenworth, Lawrence, &c., R.R. Co.* v. *United 'States*, 92 U. S. 733; *Missouri, Kansas, &c., Ry. Co.* v. '*Kansas Pacific Ry. Co.*, 97 U. S. 491; *Railroad Co.* v. '*Baldwin*, 103 U. S. 426. The terms of present grant 'are in some cases qualified by other portions of the 'granting act, as in the case of *Rice* v. *Railroad Co.* (1 'Black, 358); but unless qualified they are to receive the 'interpretation mentioned."

In *Deseret Salt Company* v. *Tarpey* (142 U. S. 241) this doctrine is reaffirmed, and the title of the Central Pacific Co. resting on the grant and identification by definite location of route of the sections granted was held to be a *legal* title sufficient to support the action of ejectment there involved. Therein the Court said:

"By the terms of the act making the grant the contention of the defendant is not supported. Those terms import the transfer of a present title, not one to be made in the future. They are that 'there be and is hereby 'granted' to the Company every alternate section of the lands. No partial or limited interest is designated, but the lands themselves are granted, as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions—a position to be presently considered.

"In a great number of cases grants containing similar terms have been before this Court for consideration. They have always received the same construction, that, unless the terms are restricted by other clauses, they import a grant *in præsenti*, carrying at once the interest of the grantor in the lands described. *Schulenburg* v. *Harriman*, 21 Wall. 44; *Leavenworth, Lawrence and Galveston Railroad* v. *United States*, 92 U. S. 733.

"In *Wisconsin Central Railroad Co.* v. *Price County* (133 U. S. 496, 507), referring to the different acts of Congress making grants to aid in the construction of railroads, we stated that they were similar in their general provisions, and had been before this Court for consideration at different times, and of the title they passed we said: 'The title conferred was a present one, so as 'to insure the donation for the construction of the road 'proposed against any revocation by Congress, except 'for non-performance of the work within the period designated, accompanied, however, with such restrictions 'upon the use and disposal of the lands as to prevent 'their diversion from the purposes of the grant.'

"As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was, therefore, in the nature of a 'float'; but when the route of the road was definitely fixed the sections granted became susceptible of identification, and the title then attached as of the date of the grant, except as to such parcels as had been in

" the meantime under its provisions appropriated to other " purposes.

" That doctrine is very clearly stated in the Leaven- " worth case above cited, where the language of the grant " was identical with that of the one under consideration, " and the court said:

" ' There be and is hereby granted ' are words of abso- " ' lute donation and import a grant *in præsenti*. This " ' court has held that they can have no other meaning, " ' and the land department on this interpretation of them " ' has uniformly administered every previous similar " ' grant. They vest a present title in the State of Kansas " ' (the grantee named), though a survey of the lands and " ' a location of the road are necessary to give precision " ' to it and attach it to any particular tract. The grant " ' then becomes certain, and, by relation, has the same " ' effect upon the selected parcels as if it had specifically " ' described them.'

" The terms used in the granting clause of the act of " Congress, and the interpretation thus given to them, ex- " clude the idea that they are to be treated as words of con- " tract or promise rather than, as they naturally import, as " words indicating an immediate transfer of interest. " The title transferred is a *legal title*, as distinguished from " an equitable or inchoate interest."

In *Curtner et al.* v. *United States* (149 U. S. 662) this Court denied the relief sought by the United States, *i. e.*, cancellation of certain erroneous listings to the State of California, under which Curtner *et al.* claimed, because of the paramount grant thereof to the Central Pacific R.R. Co. The Court said:

"The grant was *in præsenti*, and attached upon the filing " of a map of definite location. When the identification " of a granted section became so far complete as to author- " ize the grantee to take possession, the *legal title* of the " granted land passed, and an action for possession could " be maintained by the Company or its grantees before the " issue of a patent."

And because of this right of action existing in the Company and its grantees (the real parties in interest), and its failure to invoke same during the period of limitation prescribed by the law of the State of California, the relief sought was denied.

These decisions furnish ample authority for the ruling below that the legal title passes by the grant, and such title attaches to the specific sections when identified by definite location of route to the exclusion of all subsequent, new, and changed conditions affecting the lands involved. Certainly, if *without* the legal title a certificate of entry (insufficient to support ejectment in the federal courts) and a selection of indemnity school land foreclose from their respective dates all future discoveries of mineral as operating to defeat the right to subsequent patent or certification thereunder, *a fortiori* must the same effect obtain with respect to this railroad grant when it becomes identified as to subject-matter, and complete as to title, by the act of definite location of route.

But it is urged *contra:*

(1) Mineral lands are not granted, the language being "every alternate section of public land *not mineral*," and (2) by the proviso "all mineral lands" are affirmatively excluded "from the operations of this act." Hence it is contended that, as the act of definite location can only attach the grant to the sections granted, it cannot operate upon "mineral lands" which are not thus granted but expressly excluded.

The distinction is subtle but unsound. It may be readily answered—

1. From plain analysis of the grant, and
2. By controlling interpretation.

While the grant is spoken of in a collective sense, it is

nevertheless a grant of particulars, *i. e.*, every alternate, odd-numbered section not mineral. The grant is by sections, is identified through definite location by sections, and is patented and thereafter conveyed by *this* form of description. Otherwise stated, the uniform method of land parcelling followed by the Government in subdividing its domain is made the basis of identifying the lands granted, as well as those even-numbered sections which remain to the United States for other forms of disposal.

The system of public land surveys embraces both identification by *boundaries* and classification by *character of land*. That system had been in operation many years when this grant was made. By it the Government had surveyed, classified, and sold millions of acres. Agricultural lands were thereby defined; lands of mineral character were identified, were offered at special public and private sale, and reserved from grants to States and corporations as well. In the discussion of this case this fact seems to have been largely ignored, when in truth its correct understanding and statement is a factor of controlling weight in ascertaining the *intention* of Congress by the grant here in question.

As early as 1807 (now sec. 2395 R. S.) the law required that "every surveyor shall note in his field-book the true "situation of all *mines*, salt licks, salt springs, and mill "seats which come to his knowledge; all water-courses "over which the line he runs may pass; and also the "*quality* of the lands. These field-books shall be returned "to the surveyor-general, who shall cause therefrom a de- "scription of the whole land surveyed to be made out and "transmitted to the officers who may superintend the "sales. * * * "

And by this description these officers were necessarily guided in making sales, and in reserving therefrom the mines and salt springs as the early statutes directed.

By act of May 30, 1862, sec. 2, 12 Stats. 409 (now sec. 2399, R. S.) the Printed Manual of Instructions relating to the public surveys as prepared and published by the General Land Office in 1855, was made part of every surveying contract, and the requirements therein became therefore part of the law.

These instructions will be found complete in 1 *Lester's Land Laws*, 703–724. In the introduction thereto is the warning to surveyors that unfaithfulness will be detected by special examinations; will subject the offender to civil and penal suits, and the conclusion is justly expressed that "Hence, in the execution of contracts for surveying "public lands, there is every incentive to fidelity that can "address itself either to the moral sense or to motives of "private interest."

This Manual requires the surveyor's field-books to give most complete data in matter of description, whether of natural or artificial conditions, in order to "present, as far "as possible, a full and complete topographical descrip- "tion of the country surveyed, as to every matter of useful "information, or likely to gratify public curiosity" (1 Lester, 715).

Among numerous data required to be thus shown are:

"14. *Coal* banks or beds, *peat* or turf grounds, *minerals* "and ores, with particular description of the same as to "*quality* and *extent*, and all *diggings* therefor, also *salt* "springs and licks. All reliable information you can ob- "tain respecting these objects, whether they be on your "immediate line or not, is to appear in the general descrip- "tion to be given at the end of the notes." * * *

"20. * * * with a *general description* of the town- "ship in the *aggregate*, as respects the face of the country, "its soil and *geological* features, timber, *minerals*, waters, "&c."

The survey thus made is examined, platted, and approved by the United States Surveyor-General before it becomes official. It is, and was intended to be, the guide in making disposal of the public lands. Sales are made, entries permitted, grants located and satisfied on lands thus returned by such survey and official classification. This has been, and is the accepted, standard and reliable source of information, guiding and determining the disposal of many millions of acres of the public domain since the earliest days. Title to millions of acres has passed under railroad grants under such classification, and for many years the designation of lands as made thereby has been accepted in approving and patenting railroad lists. It is, and has been, the *legislative* method of identifying and classifying the public domain since the earliest days.

When, therefore, Congress, in 1864, granted to the Northern Pacific Co. "every alternate section of public "land, not mineral, designated by odd numbers," it incorporated into the grant by express reference and necessary intendment the public land surveys which identified these odd-numbered sections. As the necessary resultant of that act and this language, it provided that the public surveys made under the law, with this particularity of detail and designed to give both *description* and *classification*, should of *themselves* furnish the requisite basis whereby the odd sections thus granted could and would be identified both by public record and monumentation on the ground. It did not as against a policy established by law and of long standing, certain and determinate of itself, and furnishing an official method under governmental control, provide or intend to provide some *other* mode of determining what was granted or what excluded, and based upon the changing views of successive officers charged with the executive duty of administering

the grant. This, we submit, was and is the clear, certain, and determinate meaning of Congress in this regard.

It fully accords with the expression used by this Court in *Leavenworth, Lawrence, &c., R.R.* v. *United States* (92 U. S. 733, 741), in construing the words "there be and "is hereby granted," viz:

"They vest a present title in the State of Kansas, "though *a survey of the lands* and a location of the road "are necessary to give precision to it and attach it to any "particular tract."

As to all lands thus surveyed and returned as mineral *prior* to the definite location of route, they are thereby excluded. As to all lands surveyed *after* that date and so returned, the exclusion is equally operative, because the grant being dependent on the subdivisional public surveys for identification of the specific odd-numbered sections granted, both in matters of *description* and *classification*, such survey and return is equally effective. The odd-numbered sections thus returned as "mineral" are *the* odd-numbered sections expressly omitted from the grant by the descriptive words thereof, and by the express proviso following, which excludes all "mineral lands" from its operation.

In a grant extending 2,500 miles in length by 80 miles in width, *this* method of determination presents every element of justice—furnishes the most reliable mode for identification of the mineral lands, and places upon the act and words of Congress a construction consistent with all its legislation reserving *known* mineral lands from sale, grant, or location, except under special laws.

Furthermore, both the act of definite location of route and the making, the return and the approval of the public survey are matters of official record. The known identity

of the land as an odd-numbered section, and its known character as mineral or agricultural land, become thereby matters of easy ascertainment. The public is protected on the one hand, the railroad grantee upon the other. Nothing is left to conjecture, or to dispute, or to subsequent necessity for submission of adversary proofs.

Upon land surveyed and returned as mineral *prior* to definite location the mining prospector or claimant may enter and hold in perfect security as against the railroad grantee. His entry and discovery of mineral *prior* to survey thereof, though subsequent to definite location, is equally protected, for the law requires the surveyor to return all such mineral lands, with their extent, quality, and all "diggings," *i. e.*, mining development, and such return would determine the *exclusion* of the land from the grant.

This construction harmonizes both the granting clause and the proviso excluding the mineral lands. Each is in words of present tense. "That there *is*, and *hereby is*, "granted" is the language of the one, and "That all "mineral lands *be*, and the same are *hereby, excluded*" is the language of the other. If the act of definite location identifies what is granted, by force of the language quoted, it must equally identify the date from which the excepting proviso operates. Each in turn being dependent on the official survey, the classification of the land as made and returned thereby determines its alternative inclusion within the *grant*, or its inclusion within the *proviso*, and hence its *exclusion* from the grant.

Again, this construction harmonizes the *indemnity* provision of the proviso excepting all mineral lands with the main indemnity provisions of the act. This will readily appear.

By the grant is given the odd-numbered sections, to

which the United States "have full title, not reserved, "sold, granted, or otherwise appropriated, and free from "pre-emption or other claims or rights at the time the "line of said road is definitely fixed, and a plat thereof "filed in the office of the Commissioner of the General "Land Office; AND WHENEVER, prior to said time, any of "said sections or parts of sections shall have been granted, "sold, reserved, occupied by homestead settlers, or pre-"empted, or otherwise disposed of, other lands shall be "selected by said company in lieu thereof, under the di-"rection of the Secretary of the Interior, in alternate "sections, and designated by odd numbers, not more "than ten miles beyond the limits of said alternate sec-"tions."

The proviso, after excepting the mineral lands "from "the operations of this act," provides:

"And in lieu thereof a like quantity of unoccupied and "unappropriated agricultural lands, in odd-numbered "sections, nearest to the line of said road, *may be selected* "*as above provided.*"

The *time* of selection under the main indemnity provision of the grant arises, and is determined by, the act of definite location, which identifies what is granted and what is excepted. After such definite location as to lands then surveyed, these exceptions are known, and as surveys progress within the grant these exceptions are identified and developed. In lieu thereof this right of indemnity selection may be exercised. Similarly on *prior* and *subsequent* surveys returning odd-numbered sections as *mineral* the same right of indemnity selection accrues. The proviso is that such indemnity for mineral lands may be selected "*as above provided*," clearly referring to the *main* indemnity provision. Hence the legal meaning and effect which attaches to the conditions, mode, and time of selec-

tion under the one provision has like effect upon the other.

It is earnestly insisted that the foregoing interpretation of this grant harmonizes all parts thereof, and gives to each full, legal and just effect. It is, moreover, capable of easy and certain application; dispels all doubt and uncertainty as to the meaning, scope, and effect of the word "known," over which opposing counsel seem greatly exercised, and affords a rule of interpretation and action just to the Government, to the railroad grantee, and to the public. It gives the Government's own identification and classification controlling effect, and puts the language of Congress used in making this grant in entire harmony with all its legislation on this subject from the beginning onward. Furthermore, it gives to the constant judicial construction of these railroad grants full recognition, and stands in entire harmony therewith; makes the act of definite location the determinative point of time for the investiture of full title under the grant, and the identification and classification by the survey the controlling factor in determining to *what* odd-numbered sections the title thus attaches and what is excluded from the grant.

It is by no means contended that the official survey will classify the lands with unfailing accuracy. That cannot be done by any system available to human knowledge or experience. But it is *the* method and system pursued for nearly one hundred years. The Manual of 1855, and honest performance of duty thereunder (which the law presumes), furnishes the *best* and the most equitable method of determining what is included within and what is excepted from a grant comprising millions of acres. Its adoption will put the grant, in language and intention, in plain accord with legislative precedent, harmonize all its parts, and furnish the *only* method whereby the grant can

be adjusted and patented within the next fifty years. It will give certainty and stability of titles—a result far more important than innumerable disputes of fact over separate parcels—and furnish a clear and certain rule of action whereby all railroad grants with similar conditions may be adjusted and closed. In reaching that result it will not open a Pandora's box of evils, but afford the fairest and most expeditious method which can be devised whereby these grants may be ultimately satisfied and the great and primary need—absolute and certain title therein—transferred to the great mass of the citizens who are now and will in future more and more become the occupiers and users of these lands.

V.

The issue of patent under the grant cannot be accepted as the final and controlling date. Patents are authorized to be issued by section four of the granting act, as each section of the railroad is examined by the Commissioners appointed for that purpose "confirming to said company "the right and title to said lands, situated opposite to "and coterminous with said completed section of road."

But repeated decisions of this Court have expressly held that they do *not* add to the title conveyed by the grant. They are a convenient record evidence of what is granted, but they do not *initiate* title nor by estoppel or otherwise convey what is expressly excepted from the grant. If issued for land reserved therefrom, they are held void, and may be attacked even in a court of law, by showing the want of power in the executive officer to issue them.

Doolan v. *Carr*, 125 U. S. 618.

In *St. Paul and Pacific* v. *Northern Pacific* (139 U. S. 1, 6), this Court, in referring to the provision for patents found in this grant to the Northern Pacific Co., said:

"This provision, it is urged, is inconsistent with the "theory that a title to the lands had previously vested in "the Company. We do not think so. There are many "reasons why patents should be issued upon the comple- "tion of each section of the road. They would not only "identify the lands as coterminous with the completed "section, but they would be evidence that, as to that por- "tion of the road, the conditions of the grant had been "complied with, and that it was thus freed from any lia- "bility to forfeiture for a disregard of them. They would "also obviate the necessity of any further evidence of the "grantee's title. As deeds of further assurance they "would thus be of great value in giving quiet and peace "to the grantee's possession."

The same views are expressed in identical language in *Wisconsin R.R. Co.* v. *Price County*, 133 U. S. 496, 510; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 251; *Ortner et al.* v. *United States*, 149 U. S. 662, 675.

Whatever is excepted from the grant cannot lawfully be included therein by the act of an executive officer in issuing patent therefor. Jurisdiction of the Land Department to determine whether land is agricultural or mineral, and hence included or excepted from the grant, is conceded, but that such right can be held determinable from the date of patent is denied. If through error of law or fraud or mistake cognizable in equity such patent should wrongfully issue, the rightful claimant to the title could hold the patentee as a trustee thereof for his benefit under the familiar rule announced in *Johnson* v. *Towsley* (13 Wall. 72) and since many times reaffirmed by this Court. And the rule that *finality* obtains by issue of patent was certainly not recognized by this Court in *McLaughlin* v.

United States (107 U. S. 526), where the railroad patent was vacated, because in that suit it was held proven that the land was valuable for minerals and was so claimed as early as 1863, while the patent issued in 1870.

The case here cannot be assimilated to the grant of swamp lands. There title vests by the grant from its date, and identification by approval of prescribed lists and patenting thereunder is a duty expressly imposed upon the Secretary of the Interior. His determination is not effective from date of patent, but is operative by relation from the date of grant. Here the *exception* is of mineral lands. Title vests or does not vest as the character of the land may be agricultural or mineral at the date of identification by the act of definite location of route. Lands may be dry when patented, and yet clearly proven to have been swamp in 1850, when the grant was made. But it cannot be said that lands found valuable for minerals in the indefinite future, but prior to patent, were hence valuable for mineral or known to be such at the time of the railroad grant and definite location. Improved methods of mining and new methods of development may create in future valuable mineral lands from those valueless for such purpose when the grant was identified by the definite location of route made many years before. The inquiry must be as to their known condition as lands valuable for minerals when the grant was identified, as to the parcels granted, by the act of definite location, controlled, as above contended, by the official survey and return thereof whereby the odd-numbered sections are identified as to *locus* and classified as to *quality*. Otherwise the harmony of these grants—the date of controlling force in determining the status of the sections as falling within or without the grant, and the uniform construction thereof announced by this Court—is all swept aside, and the arbitrary date of patent assumed

as the final and controlling test. Whereas, if the known character of the land as thus identified by definite location of route and by the official survey, the former in attaching *title*, and the latter in identifying the subject-matter to which it so attaches, is held controlling, the patent must follow the facts as thus established thereby and be given or withheld accordingly.

It is, moreover, urgently insisted that such rule of finality from the date of issue of patent would impose a responsibility upon executive officers of great and increasing proportions. The practical result would be that doubt, timidity, and fear would compel withholding of patents, and the grants would thus remain unsettled, titles jeopardized, and the growth and development of the country be seriously retarded for an indefinite period. That the mere *act* of an executive officer in matters so grave as this would create an estoppel and *per se* become the basis of passing title to possible mineral lands would necessarily provoke great delay in action, and uncertainty and change in mode of examination and proof. Railroad grantees would thus be subjected not only to great and indefinite delays, but required to meet constant changes of rule and practice prescribed by successive officials. What is required to-day and fully met may to-morrow be rescinded and wholly different methods and forms of proof prescribed. Such has been the experience of the past ten years. Decisions have been proposed, prescribing the mode and measure of proof, requiring publication of notice and separate proof by specific description of each tract, involving enormous cost. These have been withdrawn in turn and others suggested of entirely different character, and these again withdrawn. The few patents which have been issued in meantime have been granted substantially on the faith and classification of the official surveys, thus

illustrating by example the value and force of these official surveys and enforcing the argument *supra* which urges determination of the question by that standard, as being in accord with the language and intention of the grants and furnishing a rule of certain application whereby the Government, the railroads, and the public may be readily and safely guided. But to adopt the date of patent would be in effect to withhold the settlement of these grants until, under pressure of increasing necessity for quieting of titles, the unborn generations would be driven to some drastic measures of relief.

VI.

If the exception of mineral lands be held operative *beyond* the date of definite location, and as determined by the classification made by the official survey, the final acts of construction and acceptance of road and formal selection of lands should be held controlling. And this upon the just and familiar ground that by these acts the railroad grantee has then performed *all* conditions imposed by the grant, and is hence entitled to *then* receive the patent. By section four the construction and acceptance of the road, section by section, makes operative the command of the statute that "patents of land as aforesaid shall be "issued to said company, confirming to said company the "right and title to said land, situated opposite to and co-"terminous with said completed section of said road."

The *right* to such patent is then vested, unless the act of making formal selection be held as an additional and final duty resting upon the railroad grantee, because prescribed by statute (act July 1, 1864, sec. 1; 13 Stats. 335, now sec. 2237, par. 7, U. S. R. S.). Assuming this final requirement of selection to be an affirmative *duty* on the part of

the railroad grantee, it is manifest the full *right* to patent has vested when this selection has been made. The case is then controlled by the rule as expressed in *Starr* v. *Starrs* (6 Wall. 402, 418):

"The right to a patent once vested is treated by the "Government, when dealing with the public lands, as "equivalent to a patent issued."

Certainly if at that date the land is neither returned as mineral by the official survey nor known to be mineral, it is in fact and law and in the most extreme view then subject to the grant, and the grantee's vested right to the land and to the patent therefor is beyond further question or doubt. In giving like effect to an entry of public lands where all conditions prescribed had been complied with, this Court, in *Benson Mining Co.* v. *Alta Mining Co.* (145 U. S. 428, 432), said:

"In other words, when the price is paid the right to a "patent immediately arises. If not issued at once, it is "because the magnitude of the business in the Land De- "partment causes delay. But such delay, in the mere "administration of affairs, does not diminish the rights "flowing from the purchase, or cast any additional bur- "dens on the purchaser, or expose him to the assaults of "third parties."

And the Court quotes with approval the ruling in *Worth* v. *Branson* (98 U. S. 118), that:

"A party who has complied with all the terms and con- "ditions which entitle him to a patent for a particular "tract of public land acquires a vested interest therein "and is to be regarded as the equitable owner thereof."

This principle has like application here. The record shows that at date of construction and acceptance of the

road and subsequent selection of the land by the railroad company (November 8, 1886) it was then returned by the official survey and known as non-mineral land. The mineral discoveries were not made until 1888, two years after the right to patent had fully vested.

CONCLUSION.

We submit:

FIRST.

Either the title vests by the act of definite location, subject to the official identification and classification of the sections granted as made by the official survey, and all lands not then known or returned as valuable mineral lands pass under the grant; or,

SECOND.

The mineral exception ceases to operate upon all lands not so known to be valuable for minerals when the right to patent vests on performance of the final act required by the railroad grantee, viz., the formal selection of the land based upon prior and accepted construction of the road coterminous therewith.

Respectfully submitted.

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IN THE

Supreme Court of the [illegible]

RICHARD P. BARDEN et al., [illegible]

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

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Supreme Court of the United States.

RICHARD P. BARDEN *et al.*, Plaintiffs in Error,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

Supplemental Brief for Defendant in Error.

The undersigned, wholly concurring in the full and admirable briefs, original and supplementary, presented at the former hearing by Mr. McNaught, submits the following additional observations:

First Point. The whole question turns upon the *definition of mineral lands.* It is only lands "not mineral" which are granted by the act. No mineral lands can pass by it.

1. The decision of the Secretary of the Interior as to what are mineral lands, whether evidenced by issuing a patent or otherwise, is not final; and no method is provided in the act for determining what such lands are. Whether any lands described in a patent are really conveyed by it is, in any disputed case, a *question of fact* to be determined by an inquiry whether they conform to the *description* in the statute.

If the Secretary should issue a patent for lands confessedly mineral it would be absolutely void, and open to collateral attack, just as much as a patent issued by him for lands previously sold or otherwise disposed of.

2. Practically, however, his decision would be generally effective, for it would be *presumed* to be correct unless the contrary were clearly shown.

3. But he is to give a patent only for such lands as are "*not mineral*," and, in order to discharge his duty, he must know what is intended by the act as lands "not mineral;" in other words, he must have a definition to apply, and must apply it. Thus the whole question turns upon *definition*.

4. This being so, the definition must have regard to the apparent condition of the lands at *some particular time before patent;* for he is to apply it in order to discharge his duty.

5. The title to the lands, even after the patent is granted, must always be subject to the infirmity arising from the possibility of a question whether the lands, at the time to which the definition looks, were mineral or otherwise. This is a small evil. The company could not desire a patent for lands obviously mineral at that time, for it wishes a valid patent; nor would the Secretary be likely to issue a patent for such lands.

6. But if the patent were subject to the infirmity arising from the possibilities of a *discovery* of minerals at any period *in all future time*, the condition would be intolerable and certainly in conflict with the legislative intent.

Second Point. The next question is, what is *this time* to which the definition relates? Plainly the time when Congress *intended the title to vest.* Congress intended that at this point of time the grantee should have *useful, beneficial, possession.* And what this time is has been determined in a multitude of cases. It is the moment when the lands can be *identified;* that is, the moment when the route is definitely located.

It has been suggested by a decision in this court (quoted from in Mr. McNaught's originial brief, p. 117), that if the lands are not then *surveyed*, there is a possibility that the time may be deferred until such survey may be had; but it would seem that, in such case, the survey ought to describe the character of the lands, whether mineral or not, *as it was when the route was located;* otherwise the Government could, by deferring its survey, postpone the performance of its obligation indefinitely, and the transaction would be robbed of its character as a contract.

1. This disposes of the objection started on the part of the Government that when the definite location is made the Government may have no means of knowing whether the lands are mineral or not, for want of a survey. Let it take such time as it needs for this purpose, but not change the right of the other party by its own delay. If when the survey is made the time of location is regarded in ascertaining the character of the lands no harm can result and justice is done to both sides.

2. Mr. McNaught's briefs have fully shown that this view is the only one consistent with reason, with the whole legislative and administrative treatment of the subject, and, what is more to the purpose, that numerous decisions of this court absolutely require it. This court

has decided in more than one case that on the completion of definite location the grant ceases to be a float, and actually operates on the territory of the earth, giving the grantee a right of *actual possession*, so that it can *maintain ejectment*. To yield to the view of the plaintiffs in error would involve the reversal of these decisions; for, as the plaintiff in ejectment must establish affirmatively a title in himself or fail, he would necessarily fail, unless it would be sufficient for him to show, that *according to the then appearance of the land*, it was *not mineral*. If any *subsequent* discovery in respect to its character might show that it *was* mineral, within the meaning of the grant, it would follow that the time for ascertaining their character had not arrived, that the lands could not be identified, and that the grant was still a float and nothing more.

3. It might indeed be suggested that although the title vested at the time of definite location, it vested subject to a condition *subsequent*, that it should fail upon the discovery of its mineral character. This must be promptly rejected. It does, indeed, vest subject to a condition subsequent; but that condition is, and only is, that the grantee shall pay the consideration for the lands by building the road.

And the notion of the suggested condition subsequent would be otherwise repelled. It would reintroduce the perpetual infirmity of title; a thing which never could have been intended. The issuing of the patent could not nullify the condition, for, if it could, it would give a final judicial character to the determination of the Secretary, and, should he issue a patent for lands notoriously mineral at the time of the location of the route, would make that patent unassailable.

Third point. There is another and distinct aspect in which the whole argument may be presented. The

transaction between the Government and the grantee company is in every sense a *contract*. The argument of the plaintiffs in error wholly denies to it this character.

1. Nothing can be plainer than that the Government promises to convey certain lands by way of remuneration for the building of the railroad. It agrees to convey, or rather conveys, to the company a present interest in these lands, not effectual, indeed, at first, but becoming effectual upon the location of the route. This interest is subject to a condition subsequent that the road shall be built; and when that condition is performed the title is to be *confirmed* (not created) by the issuing of a patent. The agreement to build the road may not indeed be enforcible by suit, the method provided for its enforcement being the penalty which the company comes under of losing all its labor and expenditure unless it completes the road. The obligation of the Government to give the patent, however, is, in its nature, enforcible by suit, the only reason why it can not be so enforced being that the sovereign is not liable to suit. But we may easily suppose that the Government was liable to suit for the specific performance of the promise to give a patent. Existing statutes, indeed, come very near making it so liable, and it was by a divided court only that it was held in this court that such statutes did not apply to a suit for the specific performance of the Government's agreement to convey land.

2. This view enables us very easily to demonstrate that the notion that what lands are "*not mineral*" depends upon their apparent condition at the time of the issuing of the patent and is determinable only by the patent is wholly erroneous. Let it be supposed that the road has been completed and patent applied for, and that the

Secretary refuses to issue one on the alleged ground that the road has not been completed according to the conditions, and that at that time, as well as previously, the lands were, according to all appearances, *not mineral*, so that if the completion of the road had not been disputed the Government would have been bound to issue a patent for them. The company now files its bill in a district court of the United States for a specific performance, in which the character of the lands is shown, and the dispute turns upon the question of whether or not the road was completed at the time of the demand for the patent. The court finds that it was not, and dismisses the bill, and an appeal is taken to the Supreme Court of the United States. That court decides the other way—determines that the Secretary ought to have issued the patent when it was demanded, reverses the decree below, and orders a decree to be entered for the company. The company has a decree entered in its favor, and presents a copy of it to the Secretary of the Interior, and demands its patent. Pending the appeal, however, further explorations had disclosed the fact that the land was really *mineral*, and the Secretary refuses the patent on that ground. According to the argument of the plaintiffs in error his refusal is justified and required—that is to say, *that the wrongful refusal of the Government to perform its own obligation has had the effect of effacing the obligation itself!*

3. The only way in which this *reductio ad absurdum* can be avoided is by at once admitting that there must be some time fixed upon *before the issue of the patent* at which it is to be determined whether the Government is bound to issue it, and that the character of the lands is to be determined as of that time, so that the right of the company can not be injuriously affected by any refusal,

or delay, by the Government after that time. This view might be expressed by saying that the Government was bound to issue the patent on the completion of the road, or within a reasonable time thereafter, and that the character of the lands was to be determined at the one time or the other, which ever were adopted. But neither of these views would be at all practicable. The second is wholly indefinite, and would leave a question of fact open which there is no means of determining, and which the statute never intended. The first is equally inconsistent with the contract, for that does not contemplate that the company is to be deprived of the useful possession of the land until the time when it is to receive its patent. If this were so it would never have been said that the title vested under the language of the act when the route was definitely located, but was subject to a condition subsequent until the patent was issued. The statute itself, the reason of the thing, and all the adjudications, assume that there is a *useful, beneficial* right of *enjoyment* intended and secured to the company long before the time for the issuing of the patent.

4. It may be urged that the Government must certainly have a reasonable time in which to make an examination of the lands in order to know what the character of them is, and that the character of the lands is not to be finally determined until the lapse of such reasonable time, and that the vesting must be postponed until that time. But this in like manner denies to the transaction the character of a contract. Such examination would be the act of the Government alone, and could be deferred, or protracted, at its pleasure. Of course, in such case, it would be the obligation of the Government to make such examination as speedily as possible, and yet if it deferred, or protracted, the performance of that obligation the character of the lands might

meanwhile change, and thus one party to the contract might by its own wrongful delay in performing its obligation relieve itself altogether from such performance.

In every contract there must be a *time* when the obligations imposed by it ripen and become enforcible. An obligation which does not mature at some definite time is no obligation at all.

It is reasonable enough and very proper that the Government should make an examination as carefully as it may choose before issuing its patent, and such examination may cause great delay. It is often the case that delays occur in the performance of contracts, but who has ever heard that it could be within the power of one party to a contract, by his *own* delay, to affect the rights of the other, or relieve himself from his own obligations? The rights of both are preserved and no difficulty will arise if, in making the examination respecting the character of the lands, the moment when the title is intended to be vested is taken as the one to be regarded.

5. The policy of the Government to *reserve* mineral lands should not be magnified beyond its real importance and intent. That policy has not been, for a long period of years, in any way similar to the ancient policy of European nations of reserving the precious metals for themselves. The underlying idea of that policy was that the precious metals should never be parted with by the Government, but be forever kept for the uses of state. This view has long been abandoned by the Government of the United States, if, indeed, it was ever entertained. The public lands are thrown open, like all others, for sale or other disposition to private individuals; no careful exploration of them is made for the purpose of accurately separating such as contain mineral wealth. It must necessarily be that lands will often be disposed of as if they were agricultural, but will subsequently turn out to possess mineral wealth. The only consequence of this is that in some instances individuals may obtain valuable

mineral lands for something less than their real worth; but the instances will not be very frequent, it being usually true that the labor expended in extracting the minerals is equal to their value when extracted.

It is very plain that Congress regarded the opening up of the territories of the nation by means of railroads as a matter far superior in importance to that of husbanding mineral lands by a careful segregation. It has never provided the means by which such segregation could be made. The immense dispositions of public lands heretofore made have not been preceded by any thorough explorations. If it had been intended, in making these railroad grants, to carefully discriminate beyond the external appearances presented at the time the grants were made between mineral and non-mineral lands, suitable provision would have been framed for such purpose, and the vesting of title would have been deferred until the results of the examination had been made known.

Finally.—There is one view conspicuously presented by the Government briefs not calculated to induce calm judicial consideration. It is that great corporations have "gobbled" up nearly the entire body of public lands, and that it is time to call a halt.

A view which excludes the obligations of contract, and even any obligation at all, is incapable of being dealt with by judicial reasoning. The Northern Pacific Railroad has been built upon the solemn promise of the Government to pay a stipulated consideration. Any disposition to withhold that stipulated consideration will certainly not be indulged in this tribunal. It would deserve the condemnation which Mr. Chief Justice Marshall once bestowed upon a somewhat similar attempt: "Such conduct would be disreputable in a private individual, and a court of equity would interfere to prevent it."

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